SUPREME COURT
OF THE UNITED STATES

No. 13-339
Title: CTS Corporation, Petitioner
v.
Peter Waldburger, et al.
Docketed: September 18, 2013
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (12-1290)
Decision Date: July 10, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 22 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Sep 13 2013	Petition for a writ of certiorari filed. (Response due October 18, 2013)
Oct 3 2013	Order extending time to file response to petition to and including November 18, 2013.
Nov 14 2013	Brief of respondents Peter Waldburger, et al. in opposition filed.
Nov 25 2013	Reply of petitioner CTS Corporation filed.
Dec 4 2013	DISTRIBUTED for Conference of January 10, 2014.
Jan 10 2014	Petition GRANTED.
Jan 22 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 23 2014	Motion to dispense with printing the joint appendix filed by petitioner CTS Corporation.
Feb 11 2014	SET FOR ARGUMENT ON Wednesday, April 23, 2014
Feb 14 2014	Record received from U.S.D.C. Western District of North Carolina is electronic (Not on PACER).
Feb 18 2014	Record received from U.S.C.A. 4th Circuit. (1 - Envelope)
Feb 24 2014	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Feb 24 2014	Brief of petitioner CTS Corporation filed.
Feb 28 2014	Brief amicus curiae of DRI - Voice of the Defense Bar filed.
Mar 3 2014	Brief amicus curiae of the United States filed.
Mar 3 2014	Brief amici curiae of American Chemistry Council, et al. filed.
Mar 10 2014	CIRCULATED.
Mar 26 2014	Brief of respondents Peter Waldburger, et al. filed. (Distributed)
Mar 31 2014	Motion of the Solicitor General for leave to participate in oral argument as

	amicus curiae and for divided argument filed.
Apr 1 2014	Brief amicus curiae of Natural Resources Defense Council filed. (Distributed)
Apr 2 2014	Brief amici curiae of Jerry Ensminger, et al. filed. (Distributed)
Apr 2 2014	Brief amici curiae of Environmental Law Professors filed. (Distributed)
Apr 11 2014	Reply of petitioner CTS Corporation filed. (Distributed)
Apr 18 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 23 2014	Argued. For petitioner: Brian J. Murray, Chicago, Ill.; and Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: John J. Korzen, Winston-Salem, N. C.
Jun 9 2014	Judgment REVERSED. Kennedy, J., delivered the opinion of the Court, except as to Part II-D. Sotomayor and Kagan, JJ., joined that opinion in full, and Roberts, C. J., and Scalia, Thomas, and Alito, JJ., joined as to all but Part II-D. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Ginsburg, J., filed a dissenting opinion, in which Breyer, J., joined.
Jul 2 2014	Petition for Rehearing filed.
Jul 17 2014	DISTRIBUTED.
Aug 11 2014	Rehearing DENIED.
Aug 11 2014	JUDGMENT ISSUED.
Aug 11 2014	Record returned for U.S.C.A. 4th Circuit.

Supreme Court, U.S.
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13-339

No. 13-___

IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For certain state-law tort actions involving environmental harms, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempts the state statute of limitations' commencement date and replaces it with a delayed commencement date provided by federal law. Specifically, 42 U.S.C. § 9658 provides that if "the applicable limitations period for such an action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." *Id.* § 9658(a)(1). Section 9658, in turn, defines "applicable limitations period"—i.e., the state laws to which § 9658 applies—to "mean[] the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2).

In this case, the United States Court of Appeals for the Fourth Circuit deepened a split in the state and federal appellate courts by interpreting § 9658 to preempt not just state *statutes of limitations* but also state *statutes of repose*. A statute of limitations extinguishes a claimant's right to pursue a cause of action after a certain period of time following accrual, whereas a statute of repose abolishes a cause of action as to a particular defendant after a period of time, regardless of whether the claim has accrued.

The question presented is: Did the Fourth Circuit correctly interpret 42 U.S.C. § 9658 to apply to state statutes of repose in addition to state statutes of limitations?

PARTIES TO THE PROCEEDING

The plaintiffs in this case are Respondents Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom Pinner, IV, a/k/a Bud Pinner, IV, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel L. Murphy, Laura A. Carson, Glen Horecky, Gina Horecky, Renee Richardson, David Bradley, Byron Hovey, Ramona Hovey, Peter Tatum MacQueen, IV, Bethan MacQueen, Patricia Pinner, Tom Pinner, III, a/k/a Buddy Pinner, III, and Madeline Pinner.

The defendant is Petitioner CTS Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner CTS Corporation is a publicly held corporation. It does not have any parent corporations. GAMCO Asset Management, Inc., a wholly owned subsidiary of GAMCO Investors, Inc., owns 10% or more of CTS Corporation's stock.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-36a) is reported at ___ F.3d ___. The unreported decision of the United States District Court for the Western District of North Carolina (Pet. App. 37a-39a) is available at 2012 WL 380053. The unreported memorandum and recommendation of the magistrate judge (Pet. App. 40a-47a) is available at 2011 WL 7153937.

JURISDICTION

The Fourth Circuit issued its opinion reversing the district court's final judgment on July 10, 2013. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at issue in this case provides in full:

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607 — Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions — As used in this section—

(1) Subchapter I terms — The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period — The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

> (B) Special rules — In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:
>
> (i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.
>
> (ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658.

STATEMENT OF THE CASE

A. This case concerns 42 U.S.C. § 9658, a unique federal provision that engrafts a special *federal* commencement date onto the running of *state* statutes of limitations governing *state* causes of action. This federal intrusion into state procedural law applies to any state action for "personal injury, or property damages" that arises from a "hazardous substance, or pollutant or contaminant, released into the environment from a facility." *Id.* § 9658(a)(1). For these qualifying state-law actions, § 9658 preempts the state commencement dates that would have otherwise applied under the state statutes of limitations, and provides a federal commencement date. Specifically, if the "applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the

date specified in such State statute." *Id.* And § 9658 defines the "applicable limitations period" that it covers as the "period specified in a statute of limitations during which" the qualifying state claims may be brought. *Id.* § 9658(b)(2).

The federal commencement date that § 9658 provides for these state-law claims is an "enhanced discovery rule." Pet. App. 34a. Like North Carolina, most states have statutes of limitations that begin to run when the plaintiff's "bodily harm" or "physical damage" "becomes apparent or ought reasonably to have become apparent to the" plaintiff. N.C. Gen. Stat. § 1-52(16). In place of these triggering events, § 9658 delays the commencement of the state statutes of limitations until "the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A). Accordingly, this federal discovery rule does not trigger the state statute of limitations until the plaintiff knows of (or reasonably should have known of) *both* the injury *and* the causal connection between the injury and the alleged hazardous substance at issue.

B. According to the complaint's allegations, over several decades, CTS of Asheville, Inc., operated a plant in Asheville, North Carolina, that manufactured electronic components. Pet. App. 51a. As part of the manufacturing process, CTS of Asheville used and stored various toxic solvents at the plant. *Id.* In 1983, CTS of Asheville was dissolved, and Petitioner CTS Corporation took over the plant's operations under its Asheville Division. *Id.* at 52a. CTS Corporation operated the plant for two years, and eventually

sold the property in 1987. The buyer then sold the unimproved portion of the property to a developer that built houses on the mountainside overlooking the former plant site. Pet. App. 53a-54a. Respondents—a group of individuals that purchased houses on or near the former CTS property—"contend that their land and ground water is contaminated by the toxic chemicals . . . that CTS Corporation left at the Facility when it sold the property." *Id.* at 41a.

In February 2011, Respondents brought a one-count complaint against CTS Corporation alleging that it had violated North Carolina's nuisance law. *Id.* at 55a-57a. Respondents sought monetary damages and a judgment requiring CTS Corporation to engage in reclamation of the toxic solvents and remediation of the environment around the former plant site. *Id.* at 57a. CTS Corporation moved to dismiss the complaint on the ground that North Carolina's 10-year statute of repose had eliminated Respondents' nuisance claim long before they brought this suit.

A magistrate judge recommended that the district court grant CTS Corporation's motion to dismiss. Pet. App. 40a. The magistrate initially noted that a 3-year statute of limitations governs North Carolina nuisance claims, and begins to run once "'bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant.'" Pet. App. 43a (quoting N.C. Gen. Stat. § 1-52(16)). A 10-year statute of repose also applied to these claims, however, which indicates that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Pet. App.

44a (quoting N.C. Gen. Stat. § 1-52(16)). Because "[t]he last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property," the magistrate reasoned, Respondents' nuisance claim was "barred by the statute of repose contained in N.C. Gen. Stat. § 1-52(16)." *Id.*

The magistrate rejected Respondents' two arguments for avoiding this statute of repose. The magistrate disagreed with Respondents' contention that the 10-year statute of repose violated the North Carolina Constitution's "open courts provision." Pet. App. 44a. "North Carolina courts have upheld shorter statute[s] of repose[] for other causes of action," the magistrate explained, and the 10-year limit is "not so short as to effectively abolish all potential claims." Pet. App. 45a (citing *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868 (N.C. 1983)).

More relevant here, the magistrate also rejected Respondents' position that § 9658 engrafts its federally mandated commencement date not simply onto North Carolina's 3-year statute of limitations but also onto its 10-year statute of repose. Pet. App. 46a. Relying on the Fifth Circuit's decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005), the magistrate reasoned that "[t]he clear language of the statute . . . is limited to a state's statute of limitations," not a state's statute of repose. Pet. App. 46a.

The magistrate noted the well-known substantive differences between the two types of statutes. On the one hand, "'[a] statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit.'" Pet. App. 47a (quoting *Tip-*

ton & Young Constr. Co. v. Blue Ridge Structure Co., 446 S.E.2d 603, 605 (N.C. Ct. App. 1994)). On the other, a statute of limitations is a "'procedural device that operates as a defense to limit the remedy available from an existing cause of action.'" *Id.* (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989)).

The district court subsequently adopted the magistrate's recommendation and entered final judgment for CTS Corporation. Pet. App. 39a. The court described the "magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose" as "accurate and well-reasoned." Pet. App. 39a. And the court found the Ninth Circuit's contrary holding—that CERCLA preempted both statutes of limitation and statutes of repose—to be "flawed." *Id.* (disagreeing with *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008)). Section 9658's plain language applies only to state statutes of limitations, the court explained, so the "*McDonald* court created an ambiguity where none existed." *Id.*

C. A divided panel of the Fourth Circuit reversed. Pet. App. 1a. The majority held that "the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation" in N.C. Gen. Stat. § 1-52(16). Pet. App. 2a. It began with a historical summary of how § 9658 came to be. Congress passed CERCLA in 1980 against the backdrop of well-publicized environmental disasters. Pet. App. 2a-3a. The majority thus described CERCLA as "a remedial statute" designed to abate hazardous-waste sites and to shift the costs of cleanup to responsible parties. Pet. App. 3a-4a. After CERCLA's enactment, Congress "estab-

lished a study group to examine the 'adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment.'" *Id.* at 4a (quoting 42 U.S.C. § 9651(e)(1)). The study group determined that environmental claims have long latency periods not suited for statutes of limitations running from the time of the defendant's last act or from the plaintiff's exposure to harm. Pet. App. 4a-5a. So, the study group recommended to the states that they "'adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause,'" and "'repeal . . . statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one.'" Pet. App. 5a (quoting Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies pt. 1, at 241 (Comm. Print 1982)). In 1986, the majority explained, Congress intervened by passing § 9658 instead of waiting for the states to amend their state laws. *Id.*

The majority next "review[ed] the concepts of limitations and repose." Pet. App. 9a. It noted that both limit the amount of time that a plaintiff has to bring suit. A statute of limitations "'bars claims after a specified period . . . based on the date when the claim accrued (*as when the injury occurred or was discovered*),'" and is designed to discourage plaintiffs from sitting on their rights while evidence is lost. Pet. App. 10a (quoting Black's Law Dictionary 1546 (9th ed. 2009) (emphasis added)). A statute of repose, by contrast, "'bar[s] any suit that is brought after a specified time *since the defendant acted* . . . even if this

period ends before the plaintiff has suffered a resulting injury'" and before the claim accrues. *Id.* (quoting Black's Law Dictionary at 1546 (emphasis added)). A statute of repose's grant of substantive immunity is designed to balance the interests of plaintiffs and defendants by setting a time limit beyond which no liability exists. *Id.* The majority concluded that the 10-year period at issue in this case was a statute of repose under these general definitions, as the North Carolina courts themselves had repeatedly held. Pet. App. 10a-11a.

The majority then turned to § 9658's language. It conceded that the district court could reasonably interpret § 9658 not to reach statutes of repose because it mentioned the phrase "statute of limitations" five times and the phrase "statute of repose" zero times. Pet. App. 11a-12a. Yet the majority ultimately concluded that the provision was ambiguous as to whether Congress meant the phrase "statute of limitations" to encompass statutes of repose. Pet. App. 11a. The majority reasoned that the statute of repose at issue here appears in a section of the North Carolina Code entitled "Limitations, Other than Real Property," so it could be interpreted to fall within § 9658(a) because it was "'specified in the State statute of limitations or under common law.'" Pet. App. 12a. The majority next noted that the statute of repose could be interpreted to qualify under § 9658(b)'s definition of "applicable limitations period" because it was a "period," "specified in a statute of limitations," "during which a civil action . . . may be brought." *Id.* Finally, because the statute of repose began to run at the time of the defendant's last action, its "commencement period" was earlier than the federal

commencement date and could be interpreted to trigger that delayed date. Pet. App. 12a-13a.

To avoid the appearance that it was "stretching to find ambiguity in the text," the majority provided two additional rationales to support its interpretation that the phrase "statute of limitations" could include "statute of repose." Pet. App. 13a. It noted that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." *Id.* Given this confusion, the majority found it probable that Congress intended for statute of limitations to cover statutes of repose. *Id.* Additionally, the majority opined that there is a "lack of internal consistency" between § 9658's substantive provision (§ 9658(a)(1)) and its definitional provision (§ 9658(b)(2)). The substantive provision indicates that it applies to an "applicable limitations period" "as specified in the State statute of limitations or under common law." The definition of "applicable limitations period," by contrast, defines the phrase as "the period specified in a statute of limitations" without reference to the common law. Pet. App. 13a-14a. The majority thus noted that § 9658 failed to manifest a plain meaning when state common law (rather than state statutory law) establishes the relevant limitations period. *Id.*

The majority resolved this perceived ambiguity by holding that § 9658 preempts the commencement dates in state statutes of repose. It relied on three factors. First, it cited the study group's recommendations—which were "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." Pet. App. 14a. Second, it cited CERCLA's "remedial"

nature, opting for a "broad interpretation" of "statute of limitations" to further the statute's remedial goals. *Id.* at 15a. Third, it cited the Ninth Circuit's *McDonald* decision, noting that it was "unpersuaded" by the Fifth Circuit's contrary analysis regarding the plain meaning of § 9658's text. *Id.* at 16a.

The majority concluded by suggesting that its holding may "raise the ire" of "corporations and other entities" that rely on statutes of repose, but explained that it had not turned a "blind eye" to the policies that these statutes vindicate. *Id.* After all, the majority noted, a plaintiff still must meet its burden of proof on the merits, which will prove more difficult as time passes. *Id.* at 17a. And, while its holding effectively eliminated the statute of repose by starting it and the statute of limitations at the exact same time, the 3-year period still applied so "defendants will not necessarily be endlessly subjected to the possibility of litigation." *Id.* Finally, the majority expressed again that its holding comported with the study group's recommendations. *Id.*

Judge Davis, in a short concurrence, noted that § 9658's "plain language" need not establish an ambiguity if other tools of statutory interpretation proved that an ambiguity existed. Pet. App. 18a.

Judge Thacker dissented. Pet. App. 19a-37a. Beginning with § 9658's plain language, the dissent rejected the majority's argument that the phrase "statute of limitations" was ambiguous in 1986 when Congress adopted § 9658. The dissent recognized the "modern vintage" of the differences between "statutes of limitations" and "statutes of repose." Pet. App. 24a. But this did not help the majority. Historically, statutes of limitations were "considered, along with

other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose." Pet. App. 24a. In 1986, therefore, "the only possible ambiguity may have been the meaning of 'statute of repose' and whether that term had fully matured into its modern definition." Pet. App. 26a. There had, by contrast, never been any ambiguity on the narrower scope of the phrase "statute of limitations"—the phrase actually used by § 9658.

In addition, the dissent noted that the majority's holding made § 9658 unworkable. "Importantly, the commencement date is defined as the *beginning* of the period in which a civil action may be brought." Pet. App. 29a (citing 42 U.S.C. § 9658(b)(2)-(3)). But statutes of repose like North Carolina's do not create a beginning point when a claim may be brought; they create an outer limit *whether or not* the claim could have been brought before that limit runs. *Id.* As such, "[b]ecause North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement." *Id.*

While recognizing that the court need not look to legislative history because the plain language must control, the dissent also asserted that the relevant legislative history supported its "conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose." *Id.* at 29a. Specifically, the study group's report on which the majority had relied expressly distinguished between statutes of limitations and statutes of repose,

recommending changes to *both* types of statutes. *Id.* at 31a. That the very recommendations underlying § 9658 distinguished these two kinds of statutes illustrates that Congress could not have been confused about their separate meanings. *Id.* at 32a.

The dissent bolstered this interpretation with two canons of statutory interpretation. For one, the dissent explained that "the role of legislative compromise" should play a part in § 9658's interpretation. *Id.* at 32a. The study group recommended a host of procedural reforms to state tort claims, but Congress, through § 9658, adopted only the recommendation concerning statutes of limitations. *Id.* at 34a. By doing so, Congress struck "a balance between harmonizing certain procedural matters in toxic tort cases and allowing states to continue to regulate their own substantive areas of law." *Id.* at 34a-35a. The majority frustrated this compromise (and the legislative intent) by departing from the plain language and expanding the reach of the statute.

For another, this case "arises in the context of federal preemption," so the long-standing presumption against preemption should apply. *Id.* at 35a "Just as [courts] presume 'Congress does not cavalierly preempt state-law causes of action[,]' [the courts] should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This general presumption weighed against giving § 9658 an overly broad preemptive effect. Pet. App. 35a-36a.

Since issuing its decision, the Fourth Circuit has stayed its mandate pending this Court's disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant CTS Corporation's petition for a writ of certiorari. *First*, the Fourth Circuit's decision deepens a split in the federal and state appellate courts over whether 42 U.S.C. § 9658 applies only to state statutes of limitations or also to state statutes of repose. *Second*, the Fourth Circuit's decision raises a legal issue of great practical and intrinsic importance. The question presented arises with great frequency, often in cases where millions of dollars are at stake. And the question presented is also of intrinsic importance because it affects the federal-state balance of power in an area of traditional state regulation. *Third*, the Fourth Circuit's decision runs contrary to the plain statutory text and so conflicts with this Court's settled principles of statutory interpretation. The decision below also defies this Court's long-standing presumption against preemption by construing a supposedly ambiguous federal statute to invade a traditional area of state regulation. *Fourth*, and finally, this case provides an ideal vehicle for reviewing this pure question of law, as it was decided on a motion to dismiss, and there is no dispute that the Respondents' state claim would be eliminated under North Carolina's statute of repose unless § 9658 preempts that state statute.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS A CONFLICT IN THE STATE AND FEDERAL APPELLATE COURTS

The Court should grant CTS Corporation's petition for a writ of certiorari initially because several federal and state appellate decisions have reached different conclusions on the question whether 42 U.S.C. § 9658 preempts state statutes of repose.

A. On the one hand, the Fifth Circuit has held that "the plain language of § 9658 does not extend to statutes of repose." *Burlington N. & Santa Fe Ry. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). In that case, the plaintiff sued the defendant for cleanup costs resulting from the 2003 rupture of a chemical storage tank that had been previously installed in 1988. *See id.* at 358. Because the plaintiff's state claims were barred by Texas's 15-year statute of repose, the plaintiff argued that § 9658 preempted that statute. *See id.* at 361. The Fifth Circuit rejected this argument, and affirmed the dismissal of the suit. *Id.* at 362-65.

The court began with § 9658's plain language, noting that the text covered only statutes of limitations and nowhere mentioned statutes of repose. *Id.* at 362. The "differences between statutes of limitations and statutes of repose," the court reasoned, "are substantive, not merely semantic." *Id.* A statute of limitations "extinguishes the right to prosecute an accrued cause of action after a period of time," whereas a statute of repose "abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued." *Id.* at 363. Thus, statutes of limitations generally run from the date of the plaintiff's injury and, as they are triggered by an injury, generally toll this period until the plaintiff reasonably should have learned of that injury. *Id.* "In contrast, awareness of injury is not a factor in determining when the time period of a statute of repose starts to run," as it is triggered by the defendant's underlying conduct, whether or not the plaintiff's claim has accrued. *Id.*

The Fifth Circuit next concluded that § 9658's plain language must control because no other factors illustrated an "express congressional intent to the contrary." *Id.* at 364. According to the court, "CERCLA's legislative history indicates Congress intended for § 9658 to preempt a state statute of limitations that deprives a plaintiff who suffers a long-latency disease caused by the release of a hazardous substance of his cause of action, but not to preempt a state statute of repose" that is not at all tied to the plaintiff's injury. *Id.* & nn.44-45 (citing H.R. Conf.. Rep. No. 99-962, 2d Sess. 262, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354). In light of this legislative history, reading § 9658's reference to "statutes of limitations" according to its terms "comports with a fundamental principle of statutory construction—common sense." *Burlington*, 419 F.3d at 364.

The Supreme Court of South Dakota later adopted the Fifth Circuit's interpretation of § 9658. *See Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 417 (S.D. 2008). In *Clark*, the defendant installed a fuel-storage system on the plaintiff's property. The defendant completed the work in 1992, and the plaintiff brought suit in 2006 to recover the cleanup costs of a fuel leak several years earlier. *See id.* at 408-09. In response to the defendant's argument that the state statute of repose had run, the plaintiff asserted that CERCLA preempted it. Relying on *Burlington*, *see id.* at 414-17, the South Dakota Supreme Court held that "the plain text controls." *Id.* at 417. "[T]he plain language of CERCLA only preempts state law when the applicable 'state statute of limitations' provides a commencement date that is earlier than the federally required commencement date," the court noted, and "Congress failed to include substantively different

statutes of repose within this preemptive rule." *Id.* at 417.

B. The Ninth Circuit subsequently departed from the Fifth Circuit over whether § 9658 applies to state statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008). In *McDonald*, the defendant sold property to the plaintiffs in 1976, and the plaintiffs learned in 2001 that the property might be contaminated with mercury. *Id.* at 778. The district court granted the defendant's motion for summary judgment on plaintiffs' negligence claim, relying on the Fifth Circuit's *Burlington* decision to hold that § 9658 does not apply to Oregon's statute of repose. *See McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114, 1127 (D. Or. 2006). The Ninth Circuit reversed, holding that "the term 'statute of limitations' in [§ 9658] is ambiguous and the legislative history of the section indicates that its meaning includes statutes of repose[.]" 548 F.3d at 797.

The Ninth Circuit found § 9658 ambiguous as to whether the phrase "statute of limitations" includes "statutes of repose" because "a number of cases confused the terms or used them interchangeably" when Congress adopted the provision in 1986. *Id.* at 781. As such, the Ninth Circuit criticized the Fifth Circuit's plain-meaning approach because it "failed to analyze the meaning of 'statute of limitations' at the time [§ 9658] was adopted." *Id.* at 782. The court then turned to the legislative history, which "show[ed] that Congress's primary concern in enacting [§ 9658] was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it[.]" *Id.* at 783. Because this predicament was "most likely to occur where statutes

of repose operate," the court held that such statutes should be included within § 9658 to further the section's underlying purpose. *Id.*

The Fourth Circuit's fractured decision in this case has deepened this split of appellate authority—with the majority joining the Ninth Circuit's side of the debate and the dissent joining the side of the Fifth Circuit and the Supreme Court of South Dakota. As explained above, *supra* at 11, in addition to the Ninth Circuit's textual analysis and reliance on legislative history, the Fourth Circuit also chose a liberal construction of § 9658 because "Congress's purpose in enacting CERCLA was remedial." Pet. App. 14a.

* * * *

The Court need not take CTS Corporation's word for this substantial conflict in the appellate courts. District judges have repeatedly recognized it as well. As the District of Kansas recently noted, "[t]he circuits . . . are split on the issue of whether § 9658 preempts state statutes of repose." *Mechler v. United States*, No. 12-1183, 2013 BL 205882, at *8 (D. Kan. Aug. 2, 2013). Likewise, the Southern District of Alabama has noted that "the Fifth Circuit in *Burlington* and the Ninth Circuit in *McDonald*" "disagreed on the application of § 9658 to statutes of repose." *Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1238 (S.D. Ala. 2009). Only this Court can now resolve this clear split of authority in the lower courts.

II. THE FOURTH CIRCUIT'S DECISION RAISES AN IMPORTANT AND RECURRING LEGAL ISSUE

The Court should also grant CTS Corporation's petition because it raises an important and recurring

legal issue. To begin with, the stakes are often high in environmental tort cases, with millions of dollars routinely at issue. *See, e.g.*, *Burlington*, 419 F.3d at 358 (noting that the alleged cleanup cost was $2.1 million); *see also United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 512 (1st Cir. 1996) ("Multiples of millions of dollars are involved in [CERCLA] settlements and the stakes are high, both for the public and for the parties involved"); Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 Tulane Envtl. L. J. 95, 124-25 & n.108 (2000) (citing cases for the proposition that "each year some of the largest tort judgments in the nation are against invaders of private property" in environmental suits). And because governments can be CERCLA defendants, the question presented also impacts the public fisc. *See Anderson v. United States*, 669 F.3d 161, 165 (4th Cir. 2011); *Simmons v. United States*, 421 F.3d 1199, 1202 (11th Cir. 2005) (per curiam); *see also* Br. of United States as *Amicus Curiae* in Support of Appellee at 2, *Waldburger v. CTS Corp.*, 2013 WL 3455775 (4th Cir. July 10, 2013) (No. 12-1290). Thus, many millions of dollars turn on the pure question of law presented here.

The question presented also implicates the balance of power between the federal government and the states. The "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011). But, given the Supremacy Clause, "Congress may legislate in areas traditionally regulated by the States," which is "an extraordinary power in a federalist system," one that this Court "must assume Congress does not exercise lightly." *Gregory*, 501 U.S. at

460. As such, the Court has repeatedly granted certiorari to determine whether federal laws were unambiguously meant to intrude on state prerogatives. *See, e.g.*, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544-45 (2002) (deciding whether 28 U.S.C. § 1367(d) should be interpreted to toll state statute of limitations against state actors); *Gregory*, 501 U.S. at 464-70 (deciding whether ADEA covers state judges); *cf. Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (exercising discretion to accept original jurisdiction because case "'implicates serious and important concerns of federalism'" (citation omitted)).

This case raises similar federalism concerns. Section 9658 undoubtedly invades the states' traditional authority to establish the limits that govern their *own* tort actions. *Cf. Raygor*, 534 U.S. at 544 ("allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States"). The Fifth Circuit's interpretation of § 9658 amounts to a minor encroachment by only delaying the beginning of the state statutes of limitations. The Fourth Circuit's "liberal construction" of § 9658, by contrast, dramatically increases the scope of this intrusion by effectively eviscerating state statutes of repose. *See* N.C. Gen. Stat. § 1-52. If § 9658 applies to start both the statute of limitations and the statute of repose *at the same time* (as the Fourth Circuit held), then the statute of limitations always will have run well before the statute of repose, thereby making the latter a nullity. Whether right or wrong, the decision's impact on traditional state prerogatives cannot be doubted and justifies the Court's review.

Finally, the question presented arises frequently. The district courts, for example, consider this issue often and are even more divided than the appellate courts. In addition to the district court and magistrate below, *see* Pet. App. 38a, 47a, several courts have adopted the Fifth Circuit's view that § 9658 simply does not reach statutes of repose. *See Clark*, 753 N.W.2d at 415 (noting at the time that "[a]ll recent federal district courts agree[d]" with the Fifth Circuit); *see, e.g.*, *Coleman v. H.C. Price Co.*, No. 11-2937, 2013 WL 64613, at *2-3 & n.3 (E.D. La. Jan. 4, 2013) (finding that § 9658 does not preempt statute of repose); *McDonald*, 423 F. Supp. at 1127 (same). Others have taken the Ninth Circuit's approach. *See Mechler*, 2013 BL 205882, at *8-9; *A.S.I., Inc. v. Sanders*, 835 F. Supp. 1349, 1358 (D. Kan. 1993).

Indeed, district courts in Alabama have repeatedly disagreed over whether § 9658 applies to the *very same* statute of repose. *Compare Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1358-64 (N.D. Ala. 2008) (holding that § 9658 does not preempt Alabama's statute of repose); *German ex rel. Grace v. CSX Transp., Inc.*, 510 F. Supp. 2d 630, 633-34 (S.D. Ala. 2007) (same); *with Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391-SLB, 2012 WL 4731255, at *9-13 (N.D. Ala. Sept. 28, 2012) (holding that § 9658 preempts Alabama's statute of repose); *Abrams*, 659 F. Supp. 2d at 1231-39 (same); *Fisher v. Ciba Specialty Chem. Corp.*, No. 03-0566, 2007 WL 2995525, at *15 (S.D. Ala. Oct. 11, 2007) (same). Despite the frequency with which this legal issue arises, the typically massive financial stakes involved often force settlement, thereby preventing many cases from reaching the courts of appeals.

In sum, both the importance of the question presented and the frequency with which it arises confirm that certiorari should be granted in this case.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASE LAW

The Court should also grant certiorari because the Fourth Circuit's decision conflicts with numerous principles that this Court has directed lower courts to follow when interpreting federal statutes.

First, the Fourth Circuit's holding that the phrase "statute of limitations" is ambiguous conflicts with the "cardinal rule of statutory construction" that plain statutory terms should carry their plain meanings. *Molzof v. United States*, 502 U.S. 301, 307 (1992); *see, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 (2007) (interpreting the term "willful"); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (interpreting the term "seaman"). This bedrock principle has special force when the statutory term at issue is a legal term of art with a well-settled definition. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). "In the absence of contrary indication, [the Court] assume[s] that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott Int'l*, 498 U.S. at 342.

Yet the Fourth Circuit identified no legal authority indicating that the phrase "statute of limitations" had a legal meaning encompassing a statute of repose when Congress enacted § 9658 in 1986. Rather, the phrases "statute of limitations" and "statute of repose" were distinct terms of art that distinguished distinct types of provisions. Indeed, the case law repeatedly used the phrase "statute of repose" to dis-

tinguish statutes of limitations from statutes "that begin 'to run at a time unrelated to the traditional accrual of the cause of action.'" *Bolick v. Am. Barmag Corp.*, 293 S.E.2d 415, 418 (N.C. 1982); *see J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116, 119 (D.C. 1985) ("A statute of repose differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from another ascertainable date."); *James Ferrera & Sons, Inc. v. Samuels*, 486 N.E.2d 58, 60 (Mass. App. Ct. 1985) ("There is a marked difference between a statute of limitations and a statute of repose."); *Univ. Eng'g Corp. v. Perez*, 451 So.2d 463, 465 (Fla. 1984) (per curiam) ("A statute of repose should be distinguished from a statute of limitations."); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) ("As a statute of repose is not a statute of limitations within the meaning of Superior Court Civil Rule 8(c), it need not be pleaded affirmatively."). The consensus view established by these cases was reflected in a well-known treatise: "Unlike an ordinary *statute of limitations* which begins running upon accrual of the claim, the period specified in a *statute of repose* begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. *Limitations of Actions* § 4, at 20-21 (1987) (emphases added). Even the study group whose recommendations formed the basis for § 9658 recognized the distinctions between the two types of statutes. Pet. App. 31a. Notably, however, § 9658 repeatedly identifies *only* statutes of limitations, *not* statutes of repose, as falling within its reach. The statute should have

been interpreted accordingly. *See McDermott*, 498 U.S. at 342.

To reach its contrary conclusion that the phrases statute of limitations and statute of repose are fungible, the Fourth Circuit suggested that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." Pet. App. 13a. That is not so. As the dissent noted, Pet. App. 24a, courts had historically viewed "statute of repose" as the catch-all phrase covering different types of time bars, including statutes of limitations. *See Bolick*, 293 S.E.2d at 417 (noting that "the term 'statute of repose' has traditionally been used to encompass statutes of limitation"); *see, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979) (referring to a statute of limitations as a statute of repose). But simply because the phrase statute of repose could be interpreted to cover statutes of limitations does not justify the Fourth Circuit's converse holding that the phrase statute of limitations could be interpreted to cover statutes of repose.

In all events, in the decade immediately preceding § 9658's enactment, courts had repeatedly used the phrase "statute of repose" in its *narrower* sense to define the flurry of state laws that tied the running of the applicable time limit to the defendant's actions rather than the claim's accrual. *See Lamb v. Wedgewood South Corp.*, 302 S.E.2d 868, 872 (N.C. 1983) ("This statute, like many others enacted throughout the nation, is a 'statute of repose,' which this Court has recognized constitutes a substantive definition of, rather than a procedural limitation on, rights."); *see also* Restatement (Second) of Torts § 899 cmt. g (1979) ("In recent years special 'statutes of re-

pose' have been adopted in some states covering particular kinds of activity. . . ."). Thus, far from considering this background context in which Congress enacted § 9658, the Fourth Circuit ignored it.

Second, after improperly finding an ambiguity in the phrase "statute of limitations," the Fourth Circuit improperly resolved that ambiguity by relying on CERCLA's general purposes. As this Court has repeatedly indicated, however, "'no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (citing *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion)). In other words, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *cf. In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone).").

As the dissent explained, Pet. App. 35a, the Fourth Circuit made exactly this mistake. The majority adopted the interpretation that allegedly furthered CERCLA's "remedial" purpose, noting that the Fifth Circuit's reading of statute of limitations "offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from

toxic wreckage." Pet. App. 15a. But it is unmistakably clear that Congress did *not* seek to remove all of the state procedural barriers that the study group suggested should be removed, because it did not adopt most of them. *See* Pet. App. 32a. For example, the study group recommended modified evidentiary presumptions and liberal joinder rules—yet those proposals were not adopted. *See ibid.* So the Fourth Circuit was wrong to suggest that "*whatever* furthers [§ 9658's] primary objective must be the law." *Rodriguez*, 480 U.S. at 526. Indeed, as the Fifth Circuit explained, *see Burlington*, 419 F.3d at 364 nn.44-45, the legislative history suggests that Congress was concerned *only* with some state statutes of limitations that begin to run on the plaintiff's injury rather than the plaintiff's discovery of the injury: "In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party 'discovers' that his injury was caused by the hazardous substance or pollutant or contaminant concerned." H.R. Conf. Rep. No. 99-962, 2d Sess. 262, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

Third, even if the phrase "statute of limitations" were ambiguous, the Fourth Circuit erred by ignoring the "presumption against preemption" when resolving that ambiguity. *See, e.g., Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Under the presumption, "when the text

of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Here, as the dissent observed, the "ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation." Pet. App. 35a; *see, e.g.*, *Raygor*, 534 U.S. at 544; *Hillsborough Cnty.*, 471 U.S. at 715. Section 9658 thus triggers the presumption against preemption, and the Fourth Circuit should have construed any ambiguity to *avoid* preemption. *See Altria*, 555 U.S. at 77. But the majority did exactly the opposite. It relied on CERCLA's remedial purpose to interpret all ambiguities in *favor* of preemption. When doing so, moreover, the Fourth Circuit did not even mention the presumption against preemption or offer an explanation why that presumption somehow does not apply here. Pet. App. 7a-16a. By flipping the presumption on its head, the Fourth Circuit again departed from this Court's precedents on interpreting federal statutes.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, this case presents an ideal vehicle for resolving the question presented. As an initial matter, there is no dispute that the question presented is outcome dispositive on the facts alleged in the complaint. While disagreeing on whether § 9658 reaches state statutes of repose, the lower courts have universally agreed that N.C. Gen. Stat. § 1-52(16) would bar Respondents' nuisance claim if § 9658 did not otherwise preempt that statute. Pet. App. 9a, 19a,

38a, 44a. That statute of repose runs from "the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). And the complaint makes clear that CTS Corporation's last conceivable act occurred in 1987—when it sold the relevant property—well over two decades before Respondents filed this suit in 2011. Pet. App. 53a-55a. Accordingly, Respondents suit may proceed *only if* the Fourth Circuit correctly interpreted § 9658 to preempt N.C. Gen. Stat. § 1-52(16).

There is also no dispute that N.C. Gen. Stat. § 1-52(16) is a statute of repose rather than a statute of limitations. Every judge to have considered this question in this case has reached that conclusion. Pet. App. 10a, 19a, 38a, 44a. The North Carolina courts also agree. *See, e.g.*, *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) (finding claims to be barred "by the *statute of repose* found in § 1-52(16)" (emphasis added)); *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same). So the Court need not worry about preliminary questions over whether the state statute under review falls on the "statute of repose" or "statute of limitations" side of the line. Rather, the Court can concern itself solely with the question whether § 9658 covers both kinds of statutes or reaches only statutes of limitation.

Additionally, the procedural posture of this case—a final judgment after the grant of a motion to dismiss—allows the Court to resolve the question in an efficient manner without having to confront any disputed issues of fact or side legal issues. Respondents' complaint runs only nine pages. And their appeal in

the Fourth Circuit addressed only the legal question presented in this case.

For these reasons, the Court could not ask for a better vehicle to resolve the important legal question presented on which the federal and state appellate courts have split. The question is outcome determinative on the facts alleged, it arises at a stage with a small record, and it is the sole issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 13, 2013

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.
No. 12–1290.

Peter WALDBURGER; Sandra Ratcliffe; Lee Ann Smith; Tom Pinner, IV, a/k/a Bud Pinner, IV; Hans Momkes; Wilma Momkes; Walter Dockins, Jr.; Autumn Dockins; William Clark Lisenbee; Dan Murphy; Lori Murphy; Robert Aversano; Daniel L. Murphy; Laura A. Carson; Glen Horecky; Gina Horecky; Renee Richardson; David Bradley; Byron Hovey; Ramona Hovey; Peter Tatum MacQueen, IV; Bethan MacQueen; Patricia Pinner; Tom Pinner, III, a/k/a Buddy Pinner, III; Madeline Pinner, Plaintiffs–Appellants,

v.

CTS CORPORATION, Defendant–Appellee.

United States of America, Amicus Supporting Appellee.

Argued Jan. 30, 2013.

Decided July 10, 2013.

Before DAVIS, FLOYD, and THACKER, Circuit Judges.

Reversed and remanded by published opinion. Judge Floyd wrote the majority opinion, in which Judge Davis joined. Judge Davis wrote a separate concurring opinion. Judge Thacker wrote a dissenting opinion.

FLOYD, Circuit Judge:

In 2009, Appellants David Bradley and Renee Richardson received unwelcome news: Their well water contained concentrated levels of trichloroethylene (TCE) and cis–1, 2–dichloroethane (DCE), both solvents that have carcinogenic effects. Not surprisingly, Bradley and Richardson, and twenty-three other landowners (collectively, "the landowners"), brought a nuisance action against Appellee CTS Corporation (CTS), the alleged perpetrator. Concluding that North Carolina's ten-year limitation on the accrual of real property claims barred the suit, the district court granted CTS's Rule 12(b)(6) motion to dismiss. Having reviewed the dismissal de novo, assuming that the facts stated in the complaint are true, *Lambeth v. Bd. of Commis*, 407 F.3d 266, 268 (4th Cir. 2005), we hold that the discovery rule articulated in § 9658 of the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA), 42 U.S.C. §§ 9601–9675, preempts North Carolina's ten-year limitation. Thus, we reverse and remand.

I.

In the 1960s and '70s, the United States witnessed the repercussions of toxic waste dumping like it never had before. The Valley of the Drums[1] and Love

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[1] The Valley of the Drums is a twenty-three acre site near Louisville, Kentucky, where a large number of waste-storing drums were deposited in the 1960s. The drums' leakage and the lack of regulation at the site caused an environmental disaster. *NPL Site Narrative for A.L. Taylor (Valley of the Drums)*, Envtl. Prot. Agency (Sept. 8, 1983), http:// www.epa.gov/superfund/sites/npl/nar447.htm.

Canal[2] disasters made headlines, urging Congress to pass legislation that granted some measure of redress. In response, in 1980, Congress passed CERCLA, an act aimed at promoting efficient and equitable responses to the fallout from hazardous waste. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). Because Congress passed the legislation during the closing hours of its ninety-sixth session, and only after it reached a compromise reflecting the "blending of three separate bills," CERCLA is often criticized for its lack of precision. *See, e.g., State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039–40 (2d Cir. 1985) ("In 1980, while the Senate considered one early version of CERCLA, the House considered and passed another. The version passed by both Houses, however, was an eleventh hour compromise put together primarily by Senate leaders and sponsors of the earlier Senate versions." (citations omitted)); *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."); *see also Rhodes v. Cnty. of Darlington*, 833 F. Supp. 1163, 1172–76 (D.S.C.1992) (providing a thorough recounting of CERCLA's history). Regardless, it remains undisputed that CERCLA is a remedial

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[2] Love Canal is an area near Niagara Falls, New York. In the 1920s, it became a dumpsite for toxic chemicals. The extent of the site's contamination was brought to light in the mid-1970s. Eckardt C. Beck, *The Love Canal Tragedy*, Envtl. Prot. Agency (Jan. 1979), http://www.epa.gov/history/topics/lovecanal/01.html.

statute designed to (1) "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites" and (2) "shift the costs of cleanup to the parties responsible for the contamination." *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 826–27 (7th Cir. 2007) (quoting H.R. Rep. No. 96–1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120) (internal quotation marks omitted); *see also Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010) ("Enacted in response to New York's Love Canal disaster, CERCLA was designed, in part, to '[ensure] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.'" (footnote omitted) (quoting S. Rep. No. 96–848, at 13 (1980)).

Evidently wary about the effectiveness of the Act's final version, Congress immediately established a study group to examine the "adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e)(1). The Group consisted of twelve members designated by the American Bar Association, the American Trial Lawyers Association, the Association of State Attorneys General, and the American Law Institute. *Id.* § 9651(e)(2). Among other "[r]ecurring [i]ssues in [h]azardous [w]aste [l]itigation," it considered the effect that state limitations periods have on causes of action related to hazardous waste, noting that (1) injuries from such waste generally have "long latency periods, sometimes 20 years or longer" and (2) if a state

decrees that a cause of action will accrue upon a defendant's last act or a plaintiff's exposure to harm, the statute of limitations often will fully run and defeat a lawsuit before a plaintiff is aware of his injury. Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies pt. 1, at 28 (Comm. Print 1982). Purposing to "remove unreasonable procedural and other barriers to recovery in court . . ., including rules relating to the time of accrual of actions," *id.* at 240, the Group issued the following recommendation: "that all states . . . clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause," *id.* at 241. Worth noting is that the Group did not confine its concerns simply to statutes of limitation: "The Recommendation is intended also to cover the repeal of statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one." *Id.*

Instead of waiting for individual states to amend their respective statutes, in 1986 Congress chose to "address[ ] the problem identified in the . . . study," H.R. Conf. Rep. No. 99–962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354, by enacting § 9658 of CERCLA:

> (a) State statutes of limitations for hazardous substance cases
>
> (1) Exception to State statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure

> to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.
>
> (2) State law generally applicable
>
> Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

42 U.S.C. § 9658. Per the section's definition section, "'applicable limitations period' means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) . . . may be brought," *id.* § 9658(b)(2), "'commencement date' means the date specified in a statute of limitations as the beginning of the applicable limitations period," *id.* § 9658(b)(3), and "'federally required commencement date' means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4)(A). Thus, if a state statute of limitations provides that the period in

which an action may be brought begins to run prior to a plaintiff's knowledge of his injury, § 9658 preempts the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge. And if a minor or incompetent plaintiff is involved, the period does not begin to run until the plaintiff reaches majority or competency or "has a legal representative appointed." *Id.* § 9658(b)(4)(B).

II.

During the twenty-seven years since Congress passed § 9658, the amendment has no doubt served the goal of preserving claims that otherwise would have been defeated by state statutes of limitations. But it has also generated controversy. We address one such area of dispute here—namely, whether § 9658 preempts state statutes of repose.

A.

The site at issue in this case is in Asheville, North Carolina, where CTS formerly operated a fifty-four-acre plant.[3] CTS "manufactures" and "disposes of" electronics and electronic parts, and from 1959 to 1985, it operated the Mills Gap Road Electroplating Facility (the Facility) in Asheville. At the Facility, CTS stored notable quantities of TCE and manufactured products using TCE, cyanide, chromium VI, and lead.

In 1987, CTS sold the Facility to Mills Gap Road Associates. CTS had promised realtors that the property "ha[d] been rendered in an environmentally

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[3] CTS was formed in 1959 as CTS of Asheville, Inc. In 1983, CTS of Asheville, Inc., dissolved, but CTS continued to operate the Asheville plant as CTS Corporation, Asheville Division until 1985.

clean condition," that "[t]o the best of [its] knowledge, no on-site disposal or otherwise wanton disposal methods were practiced at [the] facility," and that as soon as "the existing inventory of materials contained in drums and other miscellaneous equipment within the plant [was] removed from the premises, no threat to human health or the environment [would] remain."

Mills Gap Road Associates eventually sold portions of the land to Bradley, Richardson, and others, and as noted above, Bradley and Richardson learned subsequent to their purchases that their land was contaminated. Thus, they joined with others who "live in the vicinity of [their] residence" to bring a nuisance claim. The other property owners claim that they "have been and continue to be exposed to the CTS . . . toxins via contact from air, land and water."

The landowners cite damages such as "diminution in the value of their real property" and fear "for their health and safety and that of their family members." They request (1) a "judgment against [CTS] requiring reclamation of the 1,000,000 pounds of the toxic chemical contaminants" that belong to the corporation, (2) "remediation of the environmental harm caused by [CTS's] toxic chemicals," and (3) "monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, or . . . will suffer in the future."

B.

In North Carolina, real property actions are subject to a three-year statute of limitations per the "Limitations, Other than Real Property" section of the General Statutes. *See* N.C. Gen. Stat. § 1–52; *Crawford v. Boyette*, 464 S.E.2d 301, 303 (N.C. App.

1995). A real property action accrues when "physical damage to [a claimant's] property becomes apparent or ought reasonably to have become apparent." N.C. Gen. Stat. § 1–52(16). Notably, however, a claimant's actual or constructive knowledge of damage is not the only factor that regulates accrual. Nor does lack of such knowledge lend life to a claim indefinitely. Rather, § 1–52(16) prohibits a "cause of action [from] . . . accru[ing] more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Id.* Accordingly, once ten years have passed since a defendant's last tortious act, claims for damages from such conduct become nonexistent, regardless of whether a claimant had knowledge of his harm within the ten-year window.

Here, the last act or omission of CTS occurred in 1987, when it sold the Facility to Mills Gap Road Associates. Thus, when the landowners filed their nuisance action in 2011, CTS moved to dismiss, maintaining that North Carolina's ten-year limitation on the accrual of real property actions barred the claim. The landowners countered, citing § 9658 of CERCLA as preemptive of North Carolina's limitation. The magistrate judge rejected the landowners' argument. The court reasoned that the ten-year limitation is a statute of repose and that because § 9658 mentions only statutes of limitations, it is inapplicable here. Thus, it recommended dismissal, and the district court adopted the recommendation.

III.

Before analyzing the decision below, we briefly review the concepts of limitations and repose. Statutes of limitations and statutes of repose both

operate as limits on the amount of time that a plaintiff has to bring a claim. A statute of limitations is a "law that bars claims after a specified period . . . based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). As this Court has previously noted, such limitations serve defendants by "encourag[ing] prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). In contrast, a statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1546 (9th ed. 2009). Where repose is concerned, "considerations of the economic best interests of the public as a whole" are at play, and "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants [are] struck by determining a time limit beyond which liability no longer exists." *First United Methodist*, 882 F.2d at 866.

Here, North Carolina's ten-year limitation bars lawsuits "brought after a specified time since the defendant acted," *Black's Law Dictionary* 1546 (9th ed. 2009), without regard for the plaintiff's knowledge of his harm, N.C. Gen. Stat. § 1–52(16). As such, although North Carolina does not explicitly identify the limitation as a statute of repose (or, for that matter, use the word "repose" anywhere in its statutes), we think the court below properly categorized it as such. *Cf. Robinson v. Wadford*, 731 S.E.2d 539, 541 (N.C. Ct. App. 2012) (referring to the

ten-year limitation in § 1–52(16) as a statute of repose); *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 604 (N.C.Ct.App.1994) (same).

A.

Determining whether § 9658 affects the operation of North Carolina's ten-year limitation is an exercise in statutory interpretation. When we interpret statutes, our goal is to effectuate Congress's intent, *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010), and we accomplish this by first examining the text of the statute, *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999). If we find the meaning of the text plain, we accord it that meaning "[a]bsent . . . clearly expressed legislative intent to the contrary." *Abdelshafi*, 592 F.3d at 607 (quoting *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993)) (internal quotation marks omitted). If we determine that its meaning is ambiguous, however, we "look beyond the language of the statute to the legislative history for guidance." *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) (en banc). Moreover, we determine whether a statute's language is plain "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Holland*, 181 F.3d at 603 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997)) (internal quotation marks omitted).

B.

Here, we interpret a statute that is ambiguous. As noted by the district court, § 9658 uses the words "statute of limitations." Indeed, the phrase and its plural form appear five times. *See* § 9658(a), (b)(2),

(b)(3). Noticeably absent is the phrase "statutes of repose." Thus, a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations. We agree with the court below that the text is susceptible to this interpretation. But we also think that the text lends itself to an alternate reading—one that includes repose limitations such as North Carolina's.

Per the text of § 9658, a state limitations period must meet two conditions before the federally required commencement date applies to a cause of action: (1) it must be an "applicable limitations period" that is "specified in the State statute of limitations or under common law" and (2) it must "provide[ ] a commencement date which is earlier than the federally required commencement date." *Id.* § 9658(a)(1). For the following reasons, we think North Carolina's ten-year limitation meets these conditions here.

First, the ten-year bar is located with the statutes of limitations periods in a section titled, "Limitations, Other than Real Property." N.C. Gen. Stat. § 1–52. As such, it is a limitations period "specified in the State statute of limitations or under common law." *See* 42 U.S.C. § 9658(a)(1). Second, it is (1) a "period," (2) "specified in a statute of limitations," (3) "during which a civil action . . . may be brought"; thus, it comports with the definition of "applicable limitations period." *See id.* § 9658(b)(2). Finally, because the period begins to run when the defendant commits his last act, rather than when the plaintiff has knowledge of harm, its "commencement date . . . is earlier than the federally required commencement

date." *See id.* § 9658(a)(1). Accordingly, we conclude that in spite of § 9658's repeated use of the phrase "statute of limitations," the text is susceptible to an interpretation that includes repose limitations such as North Carolina's. In sum, we reckon § 9658's text capable of at least two interpretations, preventing it from being straightforwardly categorized as "plain and unambiguous."

Lest we seem to be stretching to find ambiguity in the text, we make two additional observations. First, the terms "statute of limitations" and "statute of repose" have seen considerable development in their usage and meaning. Indeed, a historical analysis reveals that both scholars and courts have often used the terms interchangeably. *See McDonald v. Sun*, 548 F.3d 774, 781 & n. 3, n. 4 (9th Cir. 2008) (collecting cases and academic articles that demonstrate a historical lack of distinction between the terms). Thus, in this context, Congress's choice to use "statute of limitations" is in no way dispositive as to whether it intended § 9658 to apply to statutes of repose. Rather, given the inconsistent manner in which the term has been used, it is entirely probable that in 1986, when Congress added § 9658 to CERCLA, it intended "statute of limitations" to include precisely the type of ten-year limitation that we are dealing with here. Second, § 9658 manifests a lack of internal consistency in its reference to an "applicable limitations period." Subsection (a)(1) notes that such a period is "specified in the State statute of limitations or under common law," but the definition of "applicable limitations period" and "commencement date" make no reference to common law. Thus, to the extent that a limitations period is established only under common law, § 9658 fails to

manifest a plain meaning applicable in such a circumstance.

C.

When the text of a statute is ambiguous, we "look to other indicia of congressional intent such as the legislative history" to interpret the statute. *CGM, LLC, v. BellSouth Telecomm's, Inc.*, 664 F.3d 46, 53 (4th Cir. 2011). As explained in Part I, *supra*, § 9658 was adopted by Congress to "address[ ] the problem identified in the . . . study [group report]," H.R. Conf. Rep. No. 99–962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. The study group report was equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them.

Moreover, Congress's purpose in enacting CERCLA was remedial. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L.Rev. 199, 286 (1996) ("CERLCA is not only more remedial than most legislative enactments, it is arguably the most remedial of all federal environmental statutes. . . ."). Indeed,

> [t]he Act is distinctive in the spectrum of federal environmental protection legislation in that the principal focus is remedial and corrective rather than regulatory. CERCLA does not set standards for prospective compliance by industry but essentially is a tort-like backward-looking statute designed to [clean up] expeditiously abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into the environment.

Id. (quoting William Murray Tabb & Linda A. Malone, *Environmental Law: Cases & Materials* 637 (1992)). Moreover, § 9658 resulted from Congress's additional attempts to ensure adequate remedies, and it furthers CERCLA's remedial goals by preempting state limitation periods that would otherwise bar causes of action when harms lie dormant. We have observed that "CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals." *First United Methodist*, 882 F.2d at 867.

When faced with a remedial statute, our interpretive charge is simple: Employ a "standard of liberal construction [to] accomplish [Congress's] objects." *Urie v. Thompson*, 337 U.S. 163, 180, (1949); *see also Niagara Mohawk Power Corp.*, 596 F.3d at 132 (recognizing the need to liberally construe CERCLA to accomplish congressional objectives); *see also Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.*, 191 F.3d 409, 416 (4th Cir. 1999) (same). In light of this charge, we reject a reading of § 9658 that excludes application of its provisions to North Carolina's ten-year limitation. Such an interpretation may seem to be textually sound under one possible reading of the statute, but it offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from toxic wreckage. Refusing to apply § 9658 to statutes of repose allows states to obliterate legitimate causes of action before they exist. Because this is precisely the barrier that Congress intended § 9658 to address, we will not read the statute in a manner that makes it inapplicable in such a circumstance. Doing so cannot be termed an honest attempt to "effectuate Congress's intent."

Accordingly, we hold that the federally required commencement date in § 9658 preempts North Carolina's ten-year limitation on the accrual of real property claims.

In so holding, we join the view articulated by the Ninth Circuit in *McDonald v. Sun*, in which the plaintiffs found themselves in circumstances remarkably similar to those of the landowners in this case. *See* 548 F.3d at 777–78, 783 ("[G]iven the ambiguity of the term 'statute of limitations at the time of the adoption of § [9658], taken alongside the only evidence of Congressional intent, it is evident that the term 'statute of limitations' in § [9658] was intended by Congress to include statutes of repose."). Although the Fifth Circuit delineated an opposing view in *Burlington Northern & Sante Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355 (5th Cir.2005), we are unpersuaded by its reasoning. There, the plaintiffs had knowledge of their claim prior to expiration of the state statute of repose. *Id.* at 359–60, 364–65. Thus, as recognized by that court, the "case [did] not involve the delayed discovery . . . which § 9658 was intended to address." *Id.* at 364–65.

D.

Our decision here will likely raise the ire of corporations and other entities that wish to rest in the security of statutes of repose, free from the threat of being called to account for their contaminating acts. They likely will cite the well-known policies underlying such statutes and asseverate that we have ignored them. But we are not ignorant of these policies, nor have we turned a blind eye to their importance.

Repose statutes do not exist simply to protect defendants; they also ensure that cases are processed efficiently. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("[S]tatutes of repose . . . protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise ."). And although our decision removes one potential time barrier to a plaintiff's claim, it does not relax his burden of proof. In cases with latent harms, necessary evidence will disappear as time passes, and intervening causes will complicate efforts to pin costs on one party. Even without the hindrance of an official repose statute, plaintiffs may not be able to establish a cause of action or recover damages. Furthermore, because our decision does nothing to diminish North Carolina's requirement that plaintiffs bring claims within three years of discovery, defendants will not necessarily be endlessly subjected to the possibility of litigation. Finally, our stance goes no further than that contemplated by the study group that Congress commissioned. The Group foresaw that the "legislative balance of the respective rights of potential plaintiffs and defendants," *First United Methodist*, 882 F.2d at 866, reflected in statutes of repose might in this circumstance need to tip in favor of plaintiffs: "The policy of repose expressed in the statute of limitations may be outweighed by the policy of affording the plaintiff a just opportunity to vindicate his rights." Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies pt. 2, at 14 (Comm.

Print 1982). Accordingly, we reaffirm our conclusion that North Carolina's ten-year limitation on the accrual of actions is preempted by § 9658 of CERCLA. In so holding, we simply further Congress's intent that victims of toxic waste not be hindered in their attempts to hold accountable those who have strewn such waste on their land.

IV.

For the foregoing reasons, we reverse the district court's order and remand the case so that the litigation can proceed.

REVERSED AND REMANDED

DAVIS, Circuit Judge, concurring:

"Of course, determining whether a regulation or statute is ambiguous presents a legal question, which we determine de novo." *Humanoids Group v. Rogan*, 375 F.3d 301, 306 (4th Cir. 2004). To say, as our good colleague says in dissent, that the majority's legal conclusion that § 9658 is ambiguous must be "supported by the plain language of the statute itself," *post*, at 26, finds no support in Supreme Court or Fourth Circuit authority. "Plain language" analysis does no such work. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.") (citation and internal quotation marks omitted). Moreover, in any event, as the majority opinion makes clear, "the meaning of statutory language, plain or not, depends on context." *Holloway v. United States*, 526 U.S. 1, 7 (1999) (quotations omitted). Judge Floyd's careful analysis is faithful to this important, overarching principle, and I am pleased to join his fine opinion in full.

THACKER, Circuit Judge, dissenting:

With all due respect to my friends in the majority, I must dissent. The majority essentially concludes § 9658 preempts two categories of state statutes: statutes of limitations and statutes of repose. However, in my view the plain and unambiguous language of § 9658 indicates only statutes of limitations were intended to be preempted. Even if the preemptive effect of § 9658 were susceptible to two interpretations, a presumption against preemption would counsel that we should limit § 9658's preemptive reach to statutes of limitations without also extending it to statutes of repose.

The relevant legislative history underscores this plain reading of the statute, and a plain reading of § 9658 aligns with general, deferential principles of legislative compromise that counsel against a liberal reading of the statute. Accordingly, I would affirm.

I.

Although this case arises in the context of federal preemption, at its core, it is about statutory interpretation. The key issue is whether the phrase "statute of limitations" as used in the 1986 amendments to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Act of Oct. 27, 1986, Pub. L. No. 99–499, 100 Stat. 1613 ("1986 Amendments"), and codified in 42 U.S.C. § 9658, preempts North Carolina's 10–year statute of repose.

A.

Plain Meaning

As in all matters of statutory interpretation, our starting point is an analysis of the statutory text.

Chris v. Tenet, 221 F.3d 648, 651 (4th Cir. 2000). We must begin by asking "whether the language at issue has a plain and unambiguous meaning . . . ." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). This first step may also be our last: if the statutory language has a plain and unambiguous meaning, "we must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

In determining whether the language has a plain and unambiguous meaning, "we consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Johnson v. Zimmer*, 686 F.3d 224, 232 (4th Cir.2012) (internal quotation marks omitted). If certain terms are undefined in the relevant statutory provisions, they "are typically interpreted as taking their ordinary, contemporary, common meaning." *Id.* (internal quotation marks omitted).

1.

Language of Section 9658

CERCLA § 9658 governs actions under state law for damages from exposure to hazardous substances, and provides that generally, "the statute of limitations established under State law shall apply . . . ." 42 U.S.C. § 9658(a)(2). But the statute also provides the following exception to this general rule:

> [I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

Id. § 9658(a)(1). Of critical import here, the statute defines the "applicable limitations period" as "the period specified in a *statute of limitations* during which a civil action referred to in subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2) (emphasis supplied). Similarly, the statute defines the state "commencement date" as "the date specified in a *statute of limitations* as the beginning of the applicable limitations period." *Id.* § 9658(b)(3) (emphasis supplied). The "federally required commencement date" provides an enhanced version of the traditional discovery rule and is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . were caused or contributed by the hazardous substance . . . ." *Id.* § 9658(b)(4).[1] Thus, § 9658 will preempt state law where a state statute of limitations begins to run before it would have run under the federally required commencement date.

The key question then is whether the meaning of § 9658, by its reference to "statute of limitations," is plain and unambiguous. The majority answers that question by concluding that the phrase "statute of limitations" is ambiguous, and thus encompasses both statutes of limitations and statutes of repose. *Ante* at 16 (determining that " § 9658's text [is] capable of at least two interpretations, preventing it from being straightforwardly categorized as 'plain

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[1] As opposed to a more traditional discovery rule that requires simply knowledge of the injury, the "federally required commencement date" requires both knowledge of the injury *and* its cause. Therefore, this dissent at times uses the term "enhanced discovery rule" to refer to the rule as expressed in the definition of "federally required commencement date."

and unambiguous.' "). The majority's conclusion, however, is not supported by the plain language of the statute itself.

2.

Modern and Historical Context

The difficulty presented in this case springs from the definitions of "statutes of limitations" and "statutes of repose" in use today versus their historical understanding.

Today, we understand a statute of limitations, on the one hand, to be "a procedural device that operates as a defense to limit the remedy available from an existing cause of action." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989); *see also Black's Law Dictionary* 1546 (9th ed. 2009) (defining statute of limitations as "A law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)."). In other words, a statute of limitations "extinguishes the right to prosecute an accrued cause of action after a period of time." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005) (internal quotation marks omitted). Statutes of limitations typically begin to run either on the date of the plaintiff's injury, or on the date the injury is first discovered or should have been discovered with reasonable diligence. *See id.*

A statute of repose, on the other hand, "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *First United Methodist*, 882 F.2d at 866; *see*

also Black's Law Dictionary 1546 (9th ed. 2009) (defining statute of repose as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury."). A statute of repose "abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued." *Burlington*, 419 F.3d at 363 (internal quotation marks omitted). Statutes of repose typically begin to run after "the occurrence of some event other than the injury which gave rise to the claim[,]" *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008) (internal quotation marks omitted), such as an act by a defendant or the manufacture of a product, *see Burlington*, 419 F.3d at 363.

The motivations behind statutes of limitations and statutes of repose are different as well. For example, "[s]tatutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims." *First United Methodist*, 882 F.2d at 866. Thus, they can be equitably tolled where, for example, a defendant fraudulently conceals a plaintiff's injury. *Id.* Statutes of repose are motivated by "considerations of the economic best interests of the public as a whole" and reflect "a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Id.* Thus, unlike statutes of limitations, statutes of repose are substantive grants of immunity from liability. *Id.*

But this clear distinction between statutes of limitations and statutes of repose is of modern vintage. Historically, the phrase "statute of repose" encompassed a broad range of time-bar statutes that limited litigation, and "provided peace, or 'repose,' to potential litigants. . . ." *Wenke v. Gehl Co.*, 682 N.W.2d 405, 423 (Wis. 2004); *see also id.* ("Early treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose. As the courts began to modify statutory limitations by applying the 'discovery rule,' legislatures responded by enacting absolute statutes of repose." (emphasis omitted) (quoting *Reynolds v. Porter*, 760 P.2d 816, 819–20 (Okla. 1988))).

Indeed, the earliest reference to "statutes of repose" in this circuit appears in *Bartlett v. Ambrose*, 78 F. 839, 842 (4th Cir. 1897), in which we cited the Supreme Court's language in *Pillow v. Roberts*, 54 U.S. 472, 13 How. 477 (1851), proclaiming, "[statutes of limitations] are statutes of repose, and should not be evaded by a forced construction."

Put simply, what we today would call statutes of limitations were historically considered, along with other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose. These overlapping definitions, however, have evolved into the distinct definitions we have today.

3.

"Statute of Limitations" in 1986

Using the dictionary definition of "statute of limitations" available to Congress in 1986, it is clear that there is no ambiguity as to the meaning of that term at the time § 9658 was enacted. The Fifth

Edition of *Black's Law Dictionary* (the "Fifth Edition"), the most recent edition available to Congress in 1986 at the time CERCLA was amended to include § 9658, had not yet adopted the separate, modern definitions for both "statutes of limitations" *and* "statutes of repose," but was nonetheless in accord with our modern understanding where it mattered.

The Fifth Edition of *Black's Law Dictionary* defined "statute of limitations" as follows:

> A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute. Also sometimes referred to as "statutes of repose."

Black's Law Dictionary 835 (5th ed. 1979).[2] This definition is clearly restricted to time limitations that begin to run after the right to bring the cause of action accrues, that is, after the injury or its

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[2] As noted, we now define a statute of limitations as "[a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009).

discovery, as opposed to after a predetermined period of time, regardless of whether the action otherwise accrues. It, thus, confirms that statutes of limitations were but a subset of statutes of repose and were therefore "sometimes referred to as 'statutes of repose.'" *Id.*

Notably, this definition does not adopt the inverse proposition that all statutes of repose are also statutes of limitation. Therefore, based on the definition available to Congress at the time of the 1986 Amendments, it is clear that Congress necessarily did not intend to include statutes of repose as within the definition of "statutes of limitations."

At the time of the enactment of § 9658 in 1986, then, the only possible ambiguity may have been the meaning of "statute of repose" and whether that term had fully matured into its modern definition. But Congress chose not to include "statute of repose" in § 9658, and thus we need not trouble ourselves with what Congress may have thought it meant.[3]

B.

The North Carolina Statute

After discerning the plain meaning of § 9658, we must decide whether that plain meaning preempts the application of North Carolina General Statute

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[3] Indeed, the study group commissioned by Congress to provide recommendations for the 1986 Amendments clearly understood statutes of repose to be different and distinct from statutes of limitations, as discussed *infra*, and other treatises recognized the distinction at least as early as 1987. *See Black's Law Dictionary* 1546 (9th ed. 2009) (quoting 54 C.J.S. *Limitations of Actions* § 4 (1987)).

§ 1–52(16) to Appellants' state law claim. As explained, in 1986, statutes of limitations were understood to be statutes that limited the right to maintain an action based on when the injured party accrued the right. North Carolina's three-year statute of limitations is just such a restriction and is preempted by § 9658. North Carolina's 10–year statute of repose is not; therefore, it survives beyond the 1986 Amendments.

North Carolina General Statute § 1–52(16) contains both a statute of limitations and a statute of repose. The first sentence of § 1–52(16) provides a three-year statute of limitations for personal injuries and property damages based on a traditional form of the discovery rule. N.C. Gen. Stat. § 1–52(16) ("Within three years an action . . . for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.").

Section 1–52(16) also clearly provides a substantive 10–year statute of repose that declares "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." *Id.* § 1–52(16).

But only the three-year provision specifies a time period to bring a cause of action *after* the right has accrued by operation of the discovery rule. The 10–year provision specifies a time restriction *regardless* of whether the right to bring the cause of action could have otherwise accrued. Thus, only the former three-year provision falls within the definition of "statute of

limitations" available to Congress in 1986. *See Black's Law Dictionary* 835 (5th ed. 1979) (defining "statute of limitations" as "[a] statute . . . declaring that no suit shall be maintained . . . unless brought within a specified period of time after the right accrued"). Therefore, only the three-year provision may be considered in order to determine North Carolina's "applicable limitations period." *See* 42 U.S.C. § 9658(b)(2) (defining "applicable limitations period" as "the period specified in a statute of limitations").

Section 9658 preempts state law where state law does not accord plaintiffs the benefit of the federally required commencement date found in § 9658(b)(4). Because North Carolina's three-year provision imposes the earlier, traditional discovery rule to commence the applicable limitations period, and not the commencement date mandated by § 9658, § 9658 preempts North Carolina's statute of limitations, but not its statute of repose.

In contrast, although § 9658 is clearly applicable to preempt the running of North Carolina's statute of limitations, any application to North Carolina's statute of repose is untenable. A simple attempt to map § 9658 onto the North Carolina statute of repose illustrates the point. To trigger § 9658(a)(1), the state "commencement date" must be "earlier than the federally required commencement date." 42 U.S.C. § 9658(a)(1) ("[I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date. . . ."). Importantly, the commencement date is defined as

the *beginning* of the period in which a civil action may be brought. *See id.* § 9658(b)(2)-(3).[4] But the North Carolina statute of repose does not provide a beginning or "commencement date" as that term is defined. Rather, it provides an outer limit, after which no cause of action may accrue. Because North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement.

C.

Legislative History

Given the plain meaning of the statute, we need not look to legislative history. But, even if we did, the legislative history of § 9658 also clearly supports the conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose.

As a part of the initial enactment of CERCLA in 1980, Congress commissioned a study group of expert lawyers "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment. . . ." CERCLA, Pub. L. No. 96–510, § 301(e)(1), 94 Stat. 2767 (1980). The study group

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[4] The North Carolina statute of limitations establishes the beginning of that period as the point at which "bodily harm . . . or physical damage . . . becomes apparent or ought reasonably to have become apparent. . . ." N.C. Gen. Stat. § 1–52(16).

responded with a detailed report and recommendations for improving remedies under CERCLA. *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies (Comm. Print 1982) (the "301(e) Report").

The 301(e) Report contained ten categories of recommendations, the ninth of which included recommendations for "Statutes of Limitations." The 301(e) Report outlined the rationale for implementing an enhanced discovery rule in CERCLA actions, *id.* at 28–30, and provided its recommendation, *id.* at 240–41. The 301(e) Report's recommendation with regard to statutes of limitations, in its entirety, was as follows:

> A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the traditional or the discovery rule. Since many of the hazardous wastes are carcinogens, mutagens, teratogens or substances with delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more. In states that have not clearly adopted the discovery rule (i.e., that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time barred when the plaintiff discovers his hurt. The Study Group recommends that all states that have not

> already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one.

Id.

Two key takeaways can be culled from the 301(e) Report's recommendation: (1) an enhanced discovery rule should apply to statutes of limitations; and (2) statutes of repose are separate and distinct from statutes of limitations.

First, the 301(e) Report clearly informed Congress that an enhanced discovery rule should apply to statutes of limitations in all states for injuries caused by hazardous substances. In essence, the 301(e) Report took the position that a plaintiff's statute of limitations should not begin to run until the plaintiff both discovers or should have discovered the injury, *and* realizes that his or her injury was caused by the hazardous substance. 301(e) Report at 241 ("The Study Group recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause."). Congress agreed. In enacting § 9658, Congress implemented this exact formulation of the discovery rule in its definition of the "federally required commencement date." 42 U.S.C. § 9658(b)(4)(A).[5]

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[5] The "federally required commencement date" is defined, in relevant part, as "the date the plaintiff knew (or reasonably

Second, the 301(e) Report put Congress on notice that statutes of limitations are distinct time-bars, separate from statutes of repose, even if they have the same effect. The 301(e) Report recommended to Congress not only that the aforementioned enhanced discovery rule should be applied to state statutes of limitations, but also recommended that state statutes of repose be repealed. 301(e) Report at 241 ("The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one."). By the plain language of § 9658, Congress disagreed.

Based on the 301(e) Report, Congress was clearly on notice that statutes of repose, separate and distinct from statutes of limitations, could prohibit recovery by certain plaintiffs, and yet chose to leave § 9658 completely replete of any reference to such statutes.

D.

Legislative Compromise

The majority notes that CERCLA is a remedial statute and thus deserves broad construction to accomplish its objectives. *Ante* at 17. This is true. But the plain meaning of the statute and the role of legislative compromise restrain the application of the remedial canon of statutory interpretation. *See 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915

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should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A).

F.2d 1355, 1363 (9th Cir. 1990) (noting that even if courts give CERCLA a "broad interpretation to accomplish its remedial goals[,]" courts must nonetheless "reject a construction that [CERCLA] on its face does not permit, and the legislative history does not support."); Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing too Far?*, 20 Harv. Envtl. L. Rev. 199, 300–01 (1996) ("It has been firmly established that the fact that a statute is 'highly remedial in nature' and 'entitled to a liberal construction' nevertheless 'does not justify ignoring plain words of limitation.'") (quoting *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944)); *id.* at 301 ("[T]he remedial purpose canon has diminished utility when the interpretive issue focuses on provisions of CERCLA that are the product of compromise. Such compromises can be found in both CERCLA's text and its enactment history.").[6]

In passing the 1986 Amendments, Congress did not arm toxic tort plaintiffs with every possible advantage nor remove every obstacle from their path to recovery. Rather, the 1986 Amendments reflected the process of legislative compromise based, in part, on the 301(e) Report's analysis and recommendations. As mentioned, the 301(e) Report

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[6] Even if CERCLA, as enacted in 1980, was the product of an 11th-hour compromise and, thus, also lends itself to a liberal construction for that reason as the majority seems to imply, *ante* at 4, 17–19, the provision at issue in this case, § 9658, was passed years later in 1986 after careful study and deliberation. The circumstances surrounding § 9658's passage certainly do not invite departure from its plain language.

was commissioned to evaluate existing statutory and common law remedies for environmental harms caused by hazardous substances and to provide corresponding recommendations. CERCLA, Pub. L. No. 96–510, § 301(e)(1), (4), 94 Stat. 2767 (1980).

But Congress did not implement every recommendation supplied by the 301(e) Report. In fact, quite to the contrary. For example, in its "Ninth Recommendation," the 301(e) Report recommended a variety of changes to actions arising under state law. 301(e) Report, 240–51. The 301(e) Report recommended states adopt an enhanced discovery rule, *id.* at 241; repeal statutes of repose, *id.*; adopt liberal joinder rules for plaintiffs, *id.* at 242; adopt a system of joint and several liability with a *de minimis* exception, *id.* at 243; adopt liberal joinder rules for defendants, *id.* at 244; implement their own evidentiary presumptions, *id.* at 245; and adopt a theory of strict liability for hazardous waste activities, *id.* at 245. Congress could have drafted the 1986 Amendments to implement any or all of the 301(e) Report's recommendations by preempting state law wherever it fell short of the 301(e) Report's recommendations. But the *only* revision affecting state law Congress chose to implement in the section explicitly covering state procedural reform was the enhanced discovery rule via the federally required commencement date. *See* 1986 Amendments, Pub. L. No. 99–499, § 203, 100 Stat. 1613 (1986). Notably, Congress was given the opportunity to repeal statutes of repose, but *chose not to.*

That § 9658 reaches state statutes of limitations but not statutes of repose strikes a balance between harmonizing certain procedural matters in toxic tort

cases and allowing states to continue to regulate their own substantive areas of law. It is the prerogative of Congress to strike that balance. *See Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995) (concluding that even when the application of a CERCLA provision leads to "harsh results[,]" courts should not disrupt Congress's balancing of the interests involved).

E.

Presumption Against Preemption

While at its most elemental this case concerns a matter of statutory interpretation, that task arises in the context of federal preemption. "Courts generally apply a presumption against preemption in fields the states traditionally regulate." *Nat'l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006). Just as we presume "Congress does not cavalierly pre-empt state-law causes of action[,]" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), we should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action. Even "[f]ederal laws containing a preemption clause [,]" such as § 9658, "do not automatically escape the presumption against preemption." *Id.* Rather, "[w]here the text of a preemption clause is open to more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.' " *Id.* at 335 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Here, the ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation. Therefore, the general presumption against preemption likewise weighs against giving

§ 9658 overly broad preemptive effect. *See Barnes ex rel. Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008) (discussing the preemptive effect of § 9658 and noting that "[i]f the extent of Congress's preemptive intent is unclear, the presumption favors a finding of limited preemption."); *see generally Marsh v. Rosenbloom*, 499 F.3d 165, 178 (2d Cir. 2007) (concluding CERCLA did not preempt certain Delaware statutes in part because arguments in favor of greater monetary recovery "alone are insufficient to justify displacement of state law").

II.

CERCLA and the 1986 Amendments clearly put a thumb on the scales in favor of assisting plaintiffs who may have suffered injuries due to toxic substances. But where Congress by plain and unambiguous language has indicated how much pressure it wishes to apply in that regard, it is not the duty of this court to press harder and shift that balance. Rather, it is the prerogative of Congress to strike that legislative compromise.

In sum, because I believe the plain language of § 9658 preempts North Carolina's statute of limitations, but not its statute of repose, I would affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

WALDBURGER, et al.,	)	No. 1:11CV39
Plaintiffs.	)	Judge Graham C. Mullen
v.	)	
CTS CORPORATION,	)	
Defendant.	)	

Feb. 6, 2012

ORDER

This matter is before the court upon the memorandum and recommendation of United States Magistrate Dennis L. Howell, filed October 4, 2011. The parties were advised that pursuant to 28 U.S.C. § 636(b)(1)(C), written objections to the memorandum and recommendation must be filed within 14 days after service of the memorandum. The Plaintiffs timely filed an objection to the memorandum and recommendation on October 21, 2011, and the Defendant submitted a response to the objection on November 7, 2011.

After an independent and thorough review of the magistrate's memorandum, Plaintiffs' objections thereto, and a *de novo* review of the record, the court concludes that the recommendation to grant Defendant's Motion to Dismiss is correct and in

accordance with law. The court specifically notes that the magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose, is accurate and well-reasoned. The court has reviewed the Ninth Circuit's holding to the contrary in *McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir.2008), in which the court held that CERCLA preempted the applicable statute of repose. The court finds the reasoning of that court to be flawed. The plain language of Section 9658 of CERCLA applies only to state statutes of limitations, not statutes of repose. If the language of a statute is clear, the Fourth Circuit has stated that "[o]ur inquiry into Congress' intent is at an end, for if the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007). It appears that the *McDonald* court created an ambiguity where none existed. Plaintiffs also rely on the Georgia district court's decision in *In re: Camp Lejeune, North Carolina Water Contamination Litigation*, 1:11–md–02218 (September 29, 2011, N.D.Ga.), in support of their argument that CERCLA should preempt the statute of repose in this case. However, the court finds this case to be unpersuasive, particularly since the *Camp Lejeune* court did not hold that statutes of repose were necessarily preempted by § 9658, only that they could be based on the "factual circumstances of each plaintiff's claim." *Camp Lejeune*, p. 23.

Accordingly, the findings and conclusions of the magistrate are accepted and Defendant's Motion to Dismiss is GRANTED.

IT IS THEREFORE ORDERED that the memorandum and recommendation of the magistrate is hereby AFFIRMED.

Signed: February 6, 2012

/s/ Graham C. Mullen

Graham C. Mullen
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:11cv39

WALDBURGER, et al., Plaintiffs.	)	**MEMORANDUM AND RECOMMENDATION**
v.	)	
CTS CORPORATION, Defendant.	)	

Pending before the Court is Defendant's Motion to Dismiss [# 7]. Plaintiffs brought this action against Defendant CTS Corporation asserting a single count of nuisance arising out of the alleged contamination of Plaintiffs' property. Defendant now moves to dismiss the Complaint. The Court Recommends that the District Court **GRANT** the motion [# 7].

I. Background

CTS of Asheville, Inc. was formed in 1959 to manufacture electronics. (Pls.' Compl. ¶¶ 5 & 7.) CTS of Asheville operated a facility in the Asheville area called the Mills Gap Road Electroplating Facility (the "Facility"). (*Id.* ¶ 9.) As part of the process of manufacturing electronics, CTS of Asheville used various toxic solvents, including trichloroethylene

("TCE") at the Facility. (*Id.* ¶¶ 8–9.) CTS of Asheville also stored TCE at the Facility. (*Id.* ¶ 10.)

CTS of Asheville was dissolved in 1983. (*Id.* ¶ 14.) The Facility, however, continued operating for another two years as Defendant CTS Corporation, Asheville Division. (*Id.* ¶ 15.) Defendant CTS Corporation ceased operating the Facility in 1985. (*Id.* ¶ 19.) In 1987, CTS Corporation sold 54 acres of the industrial site where the Facility was located to a partnership, Mills Gap Road Associates. (*Id.* ¶ 23.)

Plaintiffs are all either land owners of property that was formally part of the industrial site CTS Corporation sold to Mills Gap Road Associates or property that is near the former industrial site. (*Id.* ¶ 29.) Plaintiffs contend that their land and ground water is contaminated by the toxic chemicals, including TCE, that CTS Corporation left at the Facility when it sold the property. (*Id.* ¶¶ 29–30.) These chemicals have leached into the air and water. (*Id.* ¶ 33.) In fact, two of the Plaintiff were advised by the EPA in 2009 that their well water contained levels of TCE that were not fit for human consumption. (*Id.* ¶¶ 34–35.)

Subsequently, Plaintiffs brought this action for nuisance against Defendant CTS Corporation. Plaintiffs demand monetary damages, as well as a judgment requiring reclamation of the toxic chemicals and remediation of any environmental harm caused by these chemicals. Defendant now moves to dismiss the Complaint on the ground that the claims are barred by the applicable statute of repose.

II. Legal Standard

The central issue for resolving a Rule 12(b)(6) motion is whether the complaint states a plausible claim for relief. *See Francis v. Giacomelli*, 588 F.3d 186, 189 (4th Cir. 2009). In considering a defendant's motion to dismiss, the Court accepts the allegations in the complaint as true and construes them in the light most favorable to plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir.2009); *Giacomelli*, 588 F.3d at 190–92. Although the Court accepts well-pled facts as true, it is not required to accept "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement. . . ." *Consumeraffairs.com*, 591 F.3d at 255; *see also Giacomelli*, 588 F.3d at 189.

The complaint need not contain "detailed factual allegations," but must contain sufficient factual allegations to suggest the required elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964–65 (2007); *see also Consumeraffairs.com*, 591 F.3d at 256. "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. Nor will mere labels and legal conclusions suffice. *Id.* Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009).

The complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U .S. at 570, 127 S.Ct. at 1974; *see also Consumeraffairs.com*, 591 F.3d at 255. "A claim has

facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. ___, 129 S.Ct. at 1949; *see also Consumeraffairs.com*, 591 F.3d at 255. The mere possibility that the defendants acted unlawfully is not sufficient for a claim to survive a motion to dismiss. *Consumeraffairs.com*, 591 F.3d at 256; *Giacomelli*, 588 F.3d at 193. Ultimately, the well-pled factual allegations must move a plaintiff's claims from possible to plausible. *Twombly*, 550 U.S. at 570, 127 S.Ct. at 1974; *Consumeraffairs.com*, 591 F.3d at 256.

III. Analysis

In order to prevail on their claim for nuisance under North Carolina law, Plaintiffs must demonstrate "an unreasonable interference with the use and enjoyment of their property." *Jordon v. Foust Oil Co., Inc.*, 447 S.E.2d 491, 498 (N.C. Ct. App. 1994). The three year statute of limitations set forth in N.C. Gen. Stat. § 1–52 applies to a claim of nuisance. *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 511 (N.C. 1990); *Robertson v. City of High Point*, 497 S.E.2d 300, 302 (N.C. Ct. App. 1998); *Crawford v. Boyette*, 464 S.E.2d 301, 303 (N.C. Ct. App. 1995); *James v. Clark*, 454 S.E.2d 826, 830 (N.C. Ct. App. 1995). In addition, N.C. Gen. Stat. § 1–52(16) provides that:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever

> event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

The provisions of N.C. Gen. Stat. § 1–52(16), including the ten year statute of repose, apply to nuisance actions asserting personal injury or physical damage to a plaintiff's property. *See Wilson*, 398 S.E.2d at 513; *Hodge*, 631 S.E.2d at 144–45; *Crawford*, 464 S.E.2d at 303–4. "The plain language of the statute indicates that in cases involving property damage, no cause of action may be brought more than ten years after the defendant's last act or omission." *Hodge*, 631 S.E.2d at 145. "A complaint which seeks to impose liability upon a previous landowner or operator for adjoining land contamination constitutes an action for physical damage to claimant's property, and is thus governed by N.C. Gen.Stat. § 1–52(16)." *Id.*

Here, Plaintiffs seek to impose liability on Defendant CTS Corporation, as the former landowner, for the contamination of its former land and the adjoining land. The last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property. Because Defendant CTS Corporation's last act or omission occurred more than ten years before Plaintiffs filed this action, Plaintiffs claims are barred by the statute of repose contained in N.C. Gen. Stat. § 1–52(16). *See Wilson*, 398 S.E.2d at 597; *Hodge*, 631 S.E.2d at 145.

Plaintiffs, however, contend that N.C. Gen. Stat. § 1–52(16) is unconstitutional under the open courts provision of the North Carolina Constitution. Article

I, section 18 of the North Carolina Constitution provides that:

> Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Although neither the North Carolina Supreme Court nor the Court of Appeals has ever directly addressed whether the ten year statute of repose contained in N.C. Gen. Stat. § 1–52(16) is constitutional as applied to a nuisance claim based on the contamination of land, North Carolina courts have upheld shorter statute of reposes for other causes of action. *See Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868 (N.C. 1983) (upholding six year statute of repose contained in N.C. Gen. Stat. § 1–50(5)); *Tetterton v. Long Mfg.*, 332 S.E.2d 67, 70–75 (1985) (upholding the six year statute of repose contained in N.C. Gen. Stat. § 1–50(6)); *Garrett v. Winfree*, 463 S.E.2d 411, 416–17 (N.C. Ct. App. 1995) (upholding constitutionality of N.C. Gen. Stat. § 1–15(c)). Based on the reasoning of the North Carolina Supreme Court in *Lamb*, the Court is convinced that the ten year statute of repose contained in N.C. Gen. Stat. § 1–52(16) is not unconstitutional under the open courts provision of the North Carolina Constitution. The ten year statute of repose is not so short as to effectively abolish all potential claims. *See Lamb*, 302 S.E.2d at 882 n. 7; *Tetterton*, 332 S.E.2d at 72–73.[1]

---

[1] The statute of repose, however, would likely not apply to a latent disease like cancer that a Plaintiff later contracts as a result of exposure to toxic chemicals in their drinking water. *See Jones v. United States*, 751 F.Supp.2d 835, 840–842

Accordingly, the Court finds that the application of the statute of repose to Plaintiffs' claim is not unconstitutional under the open courts provision of the North Carolina Constitution.

Finally, the statute of repose contained in N.C. Gen. Stat. § 1–52(16) is not preempted by the Comprehensive Environmental Response Compensation and Liability Act. Section 9658 provides that in cases brought under state law for property damage caused by exposure to any hazardous substance or contaminant released from a facility, the federal commencement date for the accrual of the statute of limitations shall apply. 42 U.S.C. § 9658(a)(1). Thus, CERCLA preempts the state accrual date in environmental cases. *Id.; see also Minnesota ex rel. Northern Pacific Ctr., Inc.*, 723 F. Supp. 2d 1123, 1128 (D. Minn. 2010); *Kowalski v. Goodyear tire & Rubber Co.*, 841 F.Supp. 104, 107 (W.D.N.Y. 1994). The clear language of the statute, however, is limited to a state's statute of limitations. *See* 42 U.S.C. §§ 9658(b)(2) & (3); *Burlington Northern & Sante Fe Ry. Co. v. Poole Chem. Co., Inc.*, 419 F.3d 355, 362–63 (5th Cir. 2005) (holding that the plain language of Section 9658 does not apply to a statute of repose); *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1364 (S.D. Ala. 2008) (same); *but see McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir. 2008) (holding that Section 9658 did not preempt the applicable statute of repose).

(E.D.N.C. 2010). Plaintiffs, however, concede that they are not asserting any claims for personal injury. (Pls.' Resp. Def.'s Mot. Dismiss at p. 12). Accordingly, the Court need not address this issue.

A statute of limitations and a statute of repose are two distinct types of statutes. *Id.* at 865–66. "A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." *Tipton & Young Const. Co., Inc. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 605 (N.C. Ct. App. 1994); *see also Dawson v. N.C. Dep't of Env't and Natural Res.*, 694 S.E.2d 427, 430 (N.C. Ct. App. 2010). In contrast, a statute of limitations is a "procedural device that operates as a defense to limit the remedy available from an existing cause of action." *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989). Because the plain language of Section 9658 provides that it only preempts a state statute of limitations, the Court finds that the statute does not preempt the statute of repose contained in N.C. Gen. Stat. § 1–52(16). *See id.* ("[W]hen the language of a statute is clear, there is no need to rely on its legislative history."). Accordingly, Plaintiffs' claim for nuisance is barred by the applicable statute of repose and Plaintiffs' Complaint is subject to dismissal. The Court, therefore, **RECOMMENDS** that the District Court **GRANT** the Motion to Dismiss [# 7] and dismiss the Complaint in its entirety.

IV. Conclusion

The Court **RECOMMENDS** that the District Court **GRANT** the Motion to Dismiss and dismiss the Complaint in its entirety.

Signed: October 4, 2011
/s/Dennis L. Howell
Dennis L. Howell
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Péter Waldburger
Asheville, NC

Sandra Ratcliffe
Asheville, NC

Lee Ann Smith
Arden, NC

Tom "Bud" Pinner, IV and
Patricia Pinner
Asheville, NC

Tom "Buddy" Pinner, III and
Madeline Pinner
Asheville, NC

Hans and Wilma Momkes
Asheville, NC

Walter Dockins, Jr. and
Autumn Dockins
Skyland, NC

William Clark Lisenbee
Asheville, NC

Dan and Lori Murphy
Asheville, NC

Robert Aversano
Asheville, NC

Daniel L Murphy
Asheville, NC

Case No. 1:11cv39

COMPLAINT

Laura A Carson
Asheville, NC

Glen and Gina Horecky
Asheville, NC

Renee Richardson and David Bradley
Asheville, NC

Byron and Ramona Hovey
Asheville, NC

and

Peter Tatum MacQueen, IV and Bethan MacQueen
Asheville, NC

Plaintiffs,

vs.

CTS CORPORATION
c/o Its Statutory Agent
RICHARD G CUTTER
ELKHART, IN

Defendant.

Now come the Plaintiffs, Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom "Bud" Pinner, IV, Patricia Pinner, Tom "Buddy" Pinner, III, Madeline Pinner, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel Murphy, Laura A Carson, Glen Horecky, Gina Horecky, Byron Hovey, Ramona Hovey, Renee Richardson, David Bradley, Bethan MacQueen and Peter Tatum MacQueen, IV

(hereinafter "Plaintiffs") by and through counsel, and for their complaint allege and aver as follows:

I. PARTIES AND JURISDICTION

1) At all times herein mentioned Plaintiffs were and now are residents of Buncombe County and the State of North Carolina.

2) At all times relevant Defendant, CTS CORPORATION, (hereinafter "CTS Corp.") was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business Elkhart, Indiana, and was licensed to do business in the State of North Carolina.

3) Jurisdiction exists pursuant to 28 U.S.C. 1332 in that there is diversity of citizenship between the Plaintiffs and the Defendant, and the amount in controversy is in excess of SEVENTY FIVE-THOUSAND DOLLARS ($75,000.00), exclusive of interest and costs.

4) Pursuant to 28 U.S.C. § 1391(a)(2) and (3), venue is proper in this Court, because a substantial part of the events or omissions giving rise to the claim occurred in North Carolina, and because the Court has personal jurisdiction over the defendant in this district.

II. FACTUAL ALLEGATIONS

5) CTS of Asheville, Inc. ("The corporation") was a corporation existing under the laws of the State of North Carolina formed on or about April 16, 1959 and was dissolved on December 29, 1983.

6) A true and correct copy of the Articles of Incorporation of CTS of Asheville, Inc. is attached hereto and incorporated by reference as Exhibit "1."

7) One of the expressed purposes for forming CTS of Asheville, Inc., as stated in the Articles of Incorporation was:

> To manufacture, construct, fabricate, produce, buy, purchase, acquire, deal in, sell and otherwise dispose of, both at wholesale and retail, electronics, electromechanical, electrical, radio, radar, telephone, television, and all kinds of parts, articles, devices, supplies, accessories, attachments and merchandise.

Exhibit "1" at paragraph 3(a).

8) As part of the operations of CTS of Asheville, Inc. various toxic solvents, including by not limited to trichloroethylene (TCE), cyanide, chromium VI, and lead were used in the manufacturing process for the electrical and electronic components that were manufactured by the corporation.

9) Prior to 1986, CTS of Asheville of Asheville, Inc. used the all of the above listed chemicals and other volatile organic compounds in its operations at the Mills Gap Road Electroplating Facility.

10) As of 1981, CTS of Asheville, Inc. stored 495,000 gallons of trichloroethylene at the Mills Gap Road facility and had shipped no trichloroethylene off site for processing.

11) A true and correct copy of CTS of Asheville, Inc.'s "1981 Hazardous Waste Generators Annual (Part A) Report" signed by Norman Lewis on February 4, 1982 is attached hereto and incorporated by reference as Exhibit "2."

12) In 1982, CTS of Asheville, Inc. reported a decrease in its storage of trichloroethylene at the Mills Gap Road facility to 330,000 gallons and

claimed to have shipped an additional 5,070,000 pounds of trichloroethylene to "Armegdon [sic] Chemical" in Durham, North Carolina. Exhibit "3."

13) A true and correct copy of CTS of Asheville, Inc.'s "Hazardous Waste Generators Annual [for calendar year 1982] (Part A) Report" signed by Norman Lewis on February 22, 1983 is attached hereto and incorporated by reference as Exhibit "3."

14) On December 29, 1983, CTS of Asheville, Inc. was dissolved as a North Carolina corporation. Attached as Exhibit "4" and incorporated by reference is a true and correct copy of the Articles of Dissolution filed by CTS of Asheville, Inc. with the North Carolina Secretary of State.

15) After the dissolution of CTS of Asheville, Inc., the corporation continued to operate as CTS Corp., Asheville Division. A true and correct copy of CTS Corp., Ashville Division's "Hazardous Waste Generators Annual (Part A) Report" signed by Ronnie Lewis on February 10, 1984 is attached hereto and incorporated by reference as Exhibit "5."

16) In 1983 the total amounts of trichloroethylene stored or shipped by CTS of Asheville, Inc. and/or CTS Corp., Inc. were greatly reduced. By February 10, 1984, CTS Corp., Asheville Division, reported having only 3960 pounds of trichloroethylene on hand, and only shipped 4,630 pounds of trichloroethylene to Environmental Recycling in 1983 (formally Armageddon Chemical of Durham, North Carolina).

17) In its various filings with the State of North Carolina, CTS Corp. and/or its former subsidiary CTS of Asheville, Inc. have failed to account for over

1,000,000 pounds of the spent halogenated solvent, trichloroethylene.

18) The chemicals CTS Corp. left on the site of its electroplating facility were the personal property of CTS, Corp.

19) CTS Corp. ceased operating the Mills Gap Road Electroplating Facility on or about November 1, 1985.

20) In late 1986 or early 1987, CTS Corp. began an effort to try to sell the real property it owned and formerly operated as the Mills Gap Road Electroplating Facility.

21) As part of its efforts to sell the Mills Gap Road Electroplating Facility and surrounding land, CTS Corp. represented to realtors and the community that the site "has been rendered in an environmentally clean condition."

22) A true and correct copy of Marvin Gobles, P.E. letter to Stan Greenberg of January 27, 1987 is attached hereto and incorporated by reference as Exhibit "6."

23) On or about June 25, 1987 CTS Corp. agreed to sell the 54 acres of the Mills Gap Road industrial site to a partnership, Mills Gap Road Associates. Mills Gap Road Associates, a general partnership, agreed to purchase the 54 acre site from CTS Corp. As part of the agreement CTS Corp provided specific warranties stating the lack of environmental contamination on the property.

24) A true and correct copy of the "Contract of Sale of Realty" between CTS Corp and Mills Gap Road Associates is attached hereto and incorporated by reference as Exhibit "7."

25) CTS Corp., as part of the "Contract of Sale of Realty" specifically warranted as follows:

> Seller [CTS Corp.] warrants that the Property will be the subject of an environmental audit, the results of which will be provided to the Buyer. If the results of the environmental audit indicate the presence of contaminants on or under the Property, in amounts that would exceed any applicable governmental rules or regulations, Buyer shall have the option of terminating this Contract without any further liability if the Seller decides not to undertake to remedy the identified contamination.

Exhibit "7." at 2, ¶ 5.

26) The sale of the land was finalized on December 23, 1987.

27) Mills Gap Road Associates only purchased the real property formally owned by CTS Corp. and various plant machines. Mills Gap Road Associates did not purchase any toxic chemicals from CTS, Corp.

28) The partnership never purchased, nor did it intend to purchase, any of the spent halogenated solvent, trichloroethylene, created and owned by CTS Corp. CTS Corp. left its personal property, over 1,000,000 pounds of spend halogenated dangerous toxic chemicals at the Mills Gap Road site.

29) Plaintiffs are either residents of the property formally owed by CTS of Asheville, Inc. and Mills Gap Road Associates, or are land owners near the former CTS of Asheville, Inc. site whose ground water and land is being contaminated by the various toxic substances owned by CTS, Corp.

30) By 2002, Defendant CTS Corp. received actual notice that the toxic substances it left at its former Mills Gap Road facility were leaching out and contaminating the ground water in the vicinity and seeping on to the property of the abutting land owners as well as releasing toxic fumes into the air.

31) Through the present CTS Corp. has been and continues to be aware that its toxic substances continue to leach into the ground water and air surrounding its former Mills Gap Road facility and continue to contaminate the environment including the land owned and occupied by the Plaintiffs.

III. COUNT I: NUISANCE

32) Plaintiffs reallege and reaver each and every allegation set forth in the foregoing paragraphs as if fully rewritten herein.

33) The toxic chemicals abandoned by CTS Corp., have begun to leach out into the air and water in the surrounding community and are continuing to contaminate the air, land and water in the vicinity of Mills Gap Road.

34) On November 23, 2009, Plaintiffs David Bradley and Renee Richardson were advised by the United States Environmental Protection Agency, Region 4 that their well contained TCE and DCE (cis-1,20dicholroethene). Specifically the letter stated:

> TCE was initially detected at a concentration of 842 micrograms per liter (ug/L); cis-1,2-dicholoroethene (DCE) was also detected at a concentration of 65.8 ug/L. The concentration of TCE in the sample was too high for calibration of the instrument and thus was designated with a

> qualifier of "E," meaning "exceeds calibration range."

Letter from EPA to David Bradley dated November 23, 2009, attached hereto and incorporated by reference as Exhibit "8."

35) The well water supplied to the Richardson and Bradley was not fit for human consumption. Indeed the EPA could not even determine the true concentration of the toxins in the water. The EPA informed the family,

> The probable result is that the concentrations of the TEC in this diluted sample are likely biased low. Regardless of the variability in concentration, all of these results are able the RAL ["Removal Action Level"] and MCL ["Maximum Contaminant Level"], supporting the need for EPA to supply an alternate drinking water supply to you and your family.

Exhibit "8" at 1.

36) The other Plaintiffs in this action live in the vicinity of the Richardson and Bradley residence. All of the Plaintiffs have been and continue to be exposed to the CTS Corp. toxins via contact from air, land and water.

37) The actions for CTS Corp. constitute a continuous nuisance under the law of North Carolina.

38) Plaintiffs have been and are continuing to be harmed by the nuisance created by CTS Corp. for reasons including but not limited to the diminution in the value of their real property. In addition the Plaintiffs are afraid for their health and safety and that of their family members.

WHEREFORE: the Plaintiffs demand judgment against the Defendant requiring reclamation of the 1,000,000 pounds of toxic chemical contaminants belonging to CTS Corp., remediation of the environmental harm caused by the CTS Corp.'s toxic chemicals as well as monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, or and will suffer in the future as allowed by the applicable law; for trial by a jury; and for costs, fees and other further relief that the Court may deem just and proper.

/s/Joseph L. Anderson
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Supreme Court, U.S.
FILED
NOV 14 2013
OFFICE OF THE CLERK

No. 13-339

In The
Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Congress intend the discovery rule in 42 U.S.C. § 9658 to apply to all less favorable limitations periods in state statutes of limitations, including provisions within state statutes of limitations that can be characterized as statutes of repose?

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STATEMENT OF THE CASE

The Fourth Circuit addressed the preemptive effect of the discovery rule in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) on a ten-year repose provision within a state statute of limitations. After summarizing the key aspects of the CERCLA discovery rule, the state repose provision at issue, and the proceedings below, Respondents contend that there is no meaningful circuit split on the question presented and that the decision below is consistent with this Court's case law.

CERCLA Discovery Rule

In 1980, Congress enacted CERCLA to counter "the serious environmental and health risks posed by industrial pollution." *U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA's purpose was to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 96-848, at 13 (1980).

At the same time, Congress authorized a Study Group "to determine the adequacy of existing common law and statutory remedies . . . for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e)(1). Congress directed the Study Group to evaluate, among other issues, "barriers to recovery posed by existing statutes of limitation." 42 U.S.C. § 9651(e)(3)(F).

The Study Group Report was issued on July 1, 1982. *See* Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies: A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group" [hereafter *Study Group Report*]. (The full Study Group Report, including its appendices, can be found online at http://babel.hathitrust.org/cgi/pt?id=mdp.39015004856327#view=1up;seq=366.)

The Study Group Report concluded that in hazardous waste litigation, "Commencement of the running of the statute of limitations can be a barrier to recovery under both common law and statutory remedies" because injuries from exposure to certain hazardous wastes "have long latency periods, sometimes 20 years or longer." *Study Group Report*, at 28. The "traditional rule" that an action accrued at the time of the defendant's tortious act or omission "caused great hardship" to plaintiffs with latent injuries because their claims were often time-barred before they discovered they had been injured. *Id.* at 240, Appendix B page B-2.

Accordingly, under the heading "Statutes of Limitation," the Report recommended that "all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the disease and its cause" and stated that the recommendation was "intended also to cover the repeal of the statutes of repose which, in a

number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." *Id.* at 241. Elsewhere, the Report continued to treat statutes of repose, including the North Carolina ten-year repose provision, as a subcategory of statutes of limitation, including them within summaries of "statutes of limitation" or "limitations statutes." *Id.* at Appendix B, pages B6-B10, B59, B63.

In 1986, Congress amended CERCLA and added 42 U.S.C. § 9658(a)(1), a preemption clause stating that:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. § 9658(a)(1).

Subsection (b) contains three definitions. "Applicable limitations period" is defined as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this

section may be brought." 42 U.S.C. § 9658(b)(2). "Commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). Finally, "federally required commencement date" (FRCD) is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4).

The House Conference Report noted that section 9658 was meant to "address the problem identified in the" Study Group Report, namely that "certain State statutes deprive plaintiffs of their day in court." H.R. CONF. REP. 99-962, 1986 U.S.C.C.A.N. 3276, 3354.

North Carolina Statutory Provision At Issue

The ten-year limitations provision Petitioner relies on is the second sentence of two in N.C. Gen. Stat. § 1-52(16). Section 1-52 is found in Chapter 1 (Civil Procedure), Subchapter II (Limitations), and Article 5 (Limitations, General Provisions) of the North Carolina General Statutes. The first section in Article 5 is entitled "Periods Prescribed" and provides, "The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article." N.C. Gen. Stat. § 1-46.

Section 1-52 lists causes of action subject to a three-year limitations period. Then, in subsection

(16), the first sentence provides a discovery rule that causes of action for personal injury or physical damage to property "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant." The second sentence adds the proviso "that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). Section 1-52 never uses the term "repose."

Proceedings Below

Petitioner CTS Corporation is a successor to CTS of Asheville, Inc. Pet. App. 52a. CTS of Asheville, Inc. was formed on April 16, 1959, and manufactured electronic parts at the Mills Gap Road Electroplating Facility in Buncombe County, North Carolina. Pet. App. 51a. The corporation used various toxic solvents, including trichloroethylene (TCE), cyanide, chromium VI, and lead. *Id.*

CTS of Asheville, Inc. was dissolved on December 29, 1983, and then continued to operate as CTS Corporation, Asheville Division. Pet. App. 52a. Petitioner operated the Mills Gap Road Electroplating Facility until November 1985. Pet. App. 53a. In 1986 or 1987, Petitioner marketed the facility and surrounding land, representing that the site "has been rendered in an environmentally clean condition." *Id.* In June 1987, Petitioner agreed to sell 54 acres of the

industrial site to a general partnership and provide specific warranties that the property was free of environmental contamination. *Id.* The sale was finalized in December 1987. *Id.* at 54a.

Respondents are individuals who live either on or near the property formerly owned by Petitioner. *Id.* On November 23, 2009, the United States Environmental Protection Agency (EPA) advised Respondents David Bradley and Renee Richardson that their well water contained startlingly high levels of TCE and was not fit for human consumption. *Id.* at 55a-56a. TCE is a manmade, persistent, and highly mobile solvent. *See, e.g.*, J.A. 174 ["J.A." refers to the Joint Appendix filed in the Fourth Circuit, which is available via PACER.] Concentrations of TCE above .005/mg/L can lead to liver damage, kidney damage, changed heart rhythms, and cancer. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PUBLIC HEALTH STATEMENT FOR TRICHLOROETHYLENE, at 3 (1997).

The other Respondents live in the vicinity of the Richardson and Bradley residence, and they likewise have been and continue to be exposed to toxins left behind by Respondents via contact from air, land, and water. Pet. App. 56a.

On February 22, 2011, less than two years after the EPA notification, Respondents sued Petitioner for nuisance. J.A. 15. Petitioner moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that N.C. Gen. Stat. § 1-52(16) barred the Complaint. J.A. 37, 41-42. Respondents contended that their action

was timely based in part on 42 U.S.C. § 9658. J.A. 118-19, 258-62. The district court granted Petitioner's motion to dismiss in a two-page opinion concluding that CERCLA does not apply to state statutes of repose. Pet. App. 37a-39a.

The Fourth Circuit reversed the district court and held "that the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation." Pet. App. 2a. The court noted that a "simple review" of section 9658's language could lead to the conclusion that the section applies only to statutes of limitation because it uses the phrase "statutes of limitation" five times and does not use "statutes of repose." Pet. App. 12a. The court then concluded that section 9658 can also be read to preempt the ten-year limitation provision in N.C. Gen. Stat. § 1-52(16), applying the plain language of subsection (a)(1) and the definitions in subsection (b). Pet. App. 12a-13a.

The discovery rule in section 9658(a)(1) can be read to apply to section 1-52(16)'s ten-year limitations provision, because it is an "applicable limitations period" that is "specified in the State statute of limitations" and provides "a commencement date which is earlier than the federally required commencement date." Pet. App. 12a. It is an "applicable limitations period" because it is a "period" "during which a civil action . . . may be brought." *Id.* It is "specified in the State statute of limitations" because it is located within state statutes of limitations. *Id.* Finally, the ten-year limitation period provides a "commencement date" that "is earlier than the federally

required commencement date" because it begins with the defendant's last act, not when the plaintiff discovers the harm. *Id.* at 12a-13a.

The court further reasoned that the use and meaning of the terms "statute of limitations" and "statute of repose" had developed considerably over the years and that historically the terms had often been used interchangeably. *Id.* at 13a.

Because the text of section 9658 could be read as either including statutes of repose or excluding them, the court then looked to other indicia of congressional intent. *Id.* at 14a. The court reasoned that Congress adopted section 9658 to address the problem identified in the Study Group Report, which was "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." *Id.* The court also reasoned that CERCLA is remedial, section 9658 resulted from Congress's specific concern with ensuring adequate remedies, and section 9658 furthers the Act's remedial goals by preempting state limitations periods that would bar causes of action for latent harms. *Id.* at 14a-16a.

The court concluded that interpreting section 9658 to exclude North Carolina's ten-year statute of repose would "obliterate legitimate causes of action before they exist. . . . precisely the barrier that Congress intended § 9658 to address." *Id.* at 15a. Such a

reading would thwart Congress's goal of removing barriers to relief from hazardous substances. *Id.*

REASONS FOR DENYING THE PETITION

I. There Is No Meaningful Split Among The Circuits.

Statutory terms should be construed based on their meaning when the statute was enacted. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Like the Fourth Circuit below, the only other circuit to construe "statute of limitations" in section 9658 as of when the section was enacted agrees that the section does not plainly exempt statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008).

In *McDonald*, the plaintiff learned that its property was contaminated with mercury more than twenty years after the seller had represented that no mercury remained there. The Ninth Circuit held that Oregon's ten-year statute of repose did not extinguish the plaintiff's negligence claim. *Id.* at 779. The court first determined that the term "statute of limitation" was "ambiguous regarding whether it included statutes of repose" when the statute was enacted in 1986. *Id.* at 781. As of 1986, courts often used the terms "statute of limitations" and "statute of repose" interchangeably. *Id.* Because the statute was ambiguous, the court examined CERCLA's legislative purpose to interpret its meaning. *Id.*

After reviewing CERCLA's legislative purpose, the Ninth Circuit held that CERCLA preempted Oregon's statute of repose. *Id.* at 782-83. The court reasoned that "Congress's primary concern in enacting § 9658 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it – precisely the type of circumstance involved in this case." *Id.* at 783. The court noted that "[t]his predicament can be caused by either statutes of limitation or statutes of repose, and is probably most likely to occur where statutes of repose operate." *Id.* The court held that based on the ambiguity of the phrase "statute of limitations" itself when section 9658 was enacted and the evidence of Congressional intent, it was apparent that Congress intended section 9658 to include statutes of repose. *Id.*

The Fourth Circuit's decision below and the Ninth Circuit's *McDonald* decision are entirely consistent with other circuits that have interpreted the term "statute of limitations" as of the 1980s. The Tenth Circuit, for example, recently cited both of these decisions with approval in construing the term "statute of limitations" in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. *See Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1258 (10th Cir. 2013). The Tenth Circuit determined that "'statute of limitations' did not have a consistent, clearly distinct meaning in 1989." *Id.* at 1258. The Tenth Circuit cited other circuit court discussions of the terms

"statute of limitations" and "statute of repose," observing that:

> Courts have noted the historically ambiguous and overlapping use of these terms. *E.g.*, *FHFA v. UBS Am. Inc.*, 712 F.3d 136, 140, 142-43 & n.3 (2d Cir. 2013) ("[C]ourts . . . have long used the term 'statute of limitations' to refer also to statutes of repose." (referring, inter alia, to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976))); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005) ("[T]he distinction between statutes of limitations and statutes of repose is often blurred."); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1218, n.2 (10th Cir. 1991) ("Although the statute is titled as a 'Statute of limitations,' we refer to it as a statute of repose. . . . Both types of statutes are often referred to as statutes of limitations."); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 n.17 (10th Cir. 1991), *vacated on other grounds by Dennler v. Trippet*, 503 U.S. 978 (1992) ("Although the two concepts differ," the terms statute of limitations and statute of repose "have become interchangeable.").

Id. at 1259 n.14. Then, after thoroughly examining the meaning of "statute of limitations," the Tenth Circuit concluded that "[t]he majority of the case law treats repose periods as a subcategory of statute of limitations." *Id.* at 1266.

In sum, there is broad agreement that the term "statute of limitations" did not plainly exclude statutes of repose as of the mid to late 1980s and that repose periods have usually been treated as subcategories of statutes of limitations.

The two appellate decisions relied on by Petitioner do not support review. *See Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355 (5th Cir. 2005); *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406 (S.D. 2008). In *Burlington Northern*, a case arising from a storage tank rupture, neither party briefed the question presented here. (The appellate briefs are available on Westlaw at 2004 WL 3591804, 2005 WL 3186188, and 2005 WL 3186187.) The district court had agreed with the appellant that the "federally required commencement date" of section 9658 applied but disagreed as to the limitations period that followed the commencement date. On appeal, the appellee never argued that section 9658 preempted only statutes of limitation. The parties instead disputed whether section 9658 could apply when no CERCLA claims were or could have been asserted, and they argued over various state law questions such as retroactive application of an amendment to the statute of repose. Because the Fifth Circuit reached its decision on the question presented here with no adversarial briefing or argument, *Burlington Northern* provides a weak basis for review.

Moreover, the Fifth Circuit acknowledged in *Burlington Northern* that the case did "not involve the delayed discovery for which § 9658 was intended

to address." 419 F.3d at 364-65. The claimant immediately knew it had been injured when the storage tank ruptured, well before the applicable products liability statute of repose expired. *Id.* at 358-59. The Fifth Circuit also failed to address whether the term "statute of limitations" was ambiguous when section 9658 was adopted and failed to discuss section 9658(b)(2)'s definition of "applicable limitations period" as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought."

In *Clark County*, an action for property damage against an oil tank installer, the South Dakota Supreme Court heavily relied on what was then "the highest federal court to consider this issue," *Burlington Northern*. 753 N.W.2d at 414. While the court followed *Burlington Northern* and held that section 9658 did not preempt a state statute of repose, 753 N.W.2d at 415-17, it might well decide the issue differently now, with two other federal circuits having construed CERCLA in the meantime to preempt statutes of repose. In addition, the court failed to analyze the meaning of "statute of limitations" as of 1986 and failed to address the definitions within section 9658 of "applicable limitations period" and "commencement date." The court actually did not even need to reach the issue because CERCLA does not apply to claims involving petroleum. *See* 42 U.S.C. § 9601(14). Besides *Clark County*, no other appellate decision has followed *Burlington Northern*.

That Alabama district courts have reached contrary conclusions on whether section 9658 preempts that state's common law rule of repose also does not support review. A federal district court decision "is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (quoting 18 J. Moore et al., *Moore's Federal Practice*, § 134.02[1][d], p. 134-26 (3d ed. 2011)). In any event, the most recent Alabama decision holds that section 9658 preempts Alabama's rule of repose, with reasoning entirely consistent with the decision below. *See Moore v. Walter Coke, Inc.*, No. 2:11-cv-1391, 2012 WL 4731255, at **8-13 (N.D. Ala. Sept. 28, 2012) (opinion by Chief Judge Sharon Lovelace Blackburn).

In the twenty-seven years since section 9658 was enacted, only three federal courts of appeals have addressed the issue presented, all since 2005. The question presented arises infrequently. There must be a claim for personal injury or property damage arising from exposure to a covered hazardous substance, pollutant, or contaminant that was released from a facility, and there must be a state statute of repose that ran before the plaintiff filed suit. The recency of the decisions suggests that, to the extent that the issue may be important, it is only beginning to percolate in the lower courts, and the Court can consider the question if a genuine and serious conflict develops.

II. The Decision Below Is Consistent With This Court's Case Law.

The Fourth Circuit's conclusion that section 9658 does not plainly exclude statutes of repose provisions, analysis of the phrase "statute of limitations" as of the time when section 9658 was enacted, and consideration of legislative purpose are all consistent with this Court's case law.

First, the Fourth Circuit correctly concluded that the plain meaning of section 9658 can be read to include the statute of repose provision at issue, using the language itself, the specific context, and the broader statutory context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Fourth Circuit properly analyzed the text of section 9658 itself, including the preemption provision in subsection (a)(1) and all three definitions in subsection (b). The court first accurately summarized (a)(1) as preempting a state limitations period if it (1) is an "applicable limitations period" that is "specified in the State statute of limitations or under common law" and (2) "provides a commencement date which is earlier than the federally required commencement date." Pet. App. 12a.

The court next noted that the statute of repose provision at issue is "specified in the State statute of limitations or under common law" because it is located in the state statutory section on "Limitations, Other than Real Property." *Id.* Indeed, the statute of repose provision is just one of many limitations

provisions in that Article and the Subchapter on "Limitations."

The court then noted that the ten-year limitations provision in subsection 1-52(16) fits the definition of "applicable limitations period" because it is a period specified in a statute of limitations "during which a civil action . . . may be brought." *Id.* The court's reading of "applicable limitations period" to include subsection 1-52(16) makes perfect sense. The first sentence of subsection 1-52(16) states that actions "shall not accrue" until harm is discovered, while the second sentence – the one at issue – provides "that no cause of action shall accrue more than 10 years from the last act or omission of the defendant." Read as a whole, subsection 1-52(16) defines the period "during which a civil action . . . may be brought," with the ten-year provision at issue limiting that period.

The court then concluded that the ten-year provision at issue provides a "commencement date" that is "earlier than the federally required commencement date" because the ten-year period runs from when the defendant commits its last act, while under section 9658 the limitations period begins when a plaintiff has knowledge of harm. *Id.* at 12a-13a. The court's commonsense conclusion that the provision at issue provides an earlier "commencement date" than section 9658 is consistent with other provisions in the North Carolina statutes. The first section in the Article in which section 1-52 is located is in fact entitled "Periods Prescribed" and states, "The periods

prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article." N.C. Gen. Stat. § 1-46.

Second, in concluding that the term "statute of limitations" did not exclude statute of repose provisions, the Fourth Circuit complied with the fundamental rule that a statute's terms should be given the meaning they had when the text was adopted. *See, e.g., BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004). The Fourth Circuit correctly concluded that "statute of limitations" and "statute of repose" were used interchangeably as of 1986, when section 9658 was enacted.

This Court had used the terms "statute of limitation" and "statute of repose" interchangeably before 1986. *See, e.g., United States. v. Kubrick*, 444 U.S. 111, 117 (1979) (describing statutes of limitation as statutes of repose); *Bridges v. United States*, 346 U.S. 209, 230-31 (1953) ("Of course, statutes of limitation are statutes of repose.").

Furthermore, the *Black's Law Dictionary* definition for "statute of limitation" included the statement that "Statutes of limitation are statutes of repose" and ended by noting, "Also sometimes referred to as 'statutes of repose.'" *Black's Law Dictionary* 835 (5th ed. 1979). Not only did the definition for "statute of limitation" conflate the two terms, *Black's* definition for "Repose statutes" stated simply, and fully, "See Limitation (*Statute of limitation*)." *Id.* at 1169.

Since section 9658 was enacted, this Court and others have continued to use the terms interchangeably. *See Wallace v. Kato*, 549 U.S. 384, 391, 395 (2007) (using "statute of repose" and "statute of limitations" interchangeably); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 352, 355 (1991) (stating question presented was "which statute of limitations is applicable" where one of the three choices was a statute of repose); *Nat'l Credit Union Admin. Bd.*, 727 F.3d at 1266 (concluding that "[t]he majority of the case law treats repose periods as a subcategory of statute of limitations"); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 190 (Fla. App. 1991) (explaining that "a statute of repose is a form of a statute of limitations and the terms are often used interchangeably," and holding that "'statute of repose' is subsumed in the general term 'statute of limitations'" in statutory provision at issue because, to hold otherwise, would "frustrate the legislative intent" of the provision); *Witherspoon v. Sides Constr. Co., Inc.*, 362 N.W.2d 35, 41 (Neb. 1985) ("A statute of repose is a type of a statute of limitations.").

The Study Group Report also used the terms interchangeably and treated statutes of repose as a subcategory of statutes of limitation, repeatedly including provisions that can be characterized as statutes of repose within the category of "statutes of limitation" or "limitations statutes." *Study Group Report*, at 240-41, and Appendix B pages B6-B10, B59, B63.

The absence of the term "statute of repose" in section 9658 is understandable when other statutes

are considered. A search of the United States Code reveals that Congress never uses the term "statute of repose," although it indisputably enacts statutes of repose. *See, e.g.*, 31 U.S.C. § 3731(b)(2) (creating three-year statute of limitation and ten-year statute of repose under "false claims procedure"); 21 U.S.C. § 335(b)(3)(B) (creating six-year statute of limitations and ten-year statute of repose under "Limitation on Actions"). The North Carolina ten-year limitation at issue never uses the term "repose." *See* N.C. Gen. Stat. § 1-52(16).

There is no reason in hindsight to expect Congress to have used the term "repose" in section 9658, when Congress and state legislatures such as North Carolina's were not using it themselves. *See, e.g.*, *Landis v. Phys. Ins. Co. of Wis., Inc.*, 628 N.W.2d 893, 896, 907 (Wis. 2001) (holding that phrase "[a]ny applicable statute of limitations" was ambiguous as to whether it included statutes of repose and noting that "The term 'statute of repose' is largely a judicial label for a particular type of limitation on actions" and "It is apparent that the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo.").

Third, after determining that section 9658 can be read as including statutes of repose, the Fourth Circuit properly considered Congress's remedial purpose in enacting CERCLA and section 9658's legislative history. Construing CERCLA as a broad remedial statute is consistent with this Court's interpretations of other remedial statutes. *See, e.g.*, *Atchison, T. &*

S.F.R. Co. v. Buell, 480 U.S. 557, 562 (1987) (stating that the Federal Employers' Liability Act is a "broad remedial statute" that must be given a liberal construction).

Construing section 9658 as a broad remedial statute is especially appropriate given the section's history. Congress directed the Study Group "to determine the adequacy of existing common law and statutory *remedies*" and to evaluate "barriers to recovery posed by existing statutes of limitation." 42 U.S.C. §§ 9651(e)(1) (emphasis added), (e)(3)(F). The Study Group then thoroughly analyzed the existing statutes of limitation in all the states. Under the heading "Statutes of Limitations," the Study Group then recommended that states adopt a rule that claims accrue on discovery of latent harm and its cause and stated that the recommendation was also intended to repeal statutes of repose. *Study Group Report*, at 240-41.

The Fifth Circuit, in an opinion by then-Chief Judge Edith Jones, stated that the legislative history of section 9658 is "unusually helpful" because the House Conference Report explained that the section was drafted in response to the Study Group Report. *Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir 2008). Relying on the Study Group Report, the Fifth Circuit held that the section 9658 discovery rule applies "where the conditions for CERCLA cleanup are satisfied," that is, when the plaintiff's evidence meets CERCLA's definitions of a "release" of "hazardous

substances" into the "environment" from a defendant's "facility." *Id.* at 365.

Here, applying the Fifth Circuit's test from *Barnes*, the section 9658 discovery rule would apply because the allegations in Plaintiff's Complaint satisfy all the relevant statutory definitions in CERCLA for a "release" of "hazardous substances" into the "environment" from Petitioner's "facility." *Compare* Pet. App. 51a-56a ((Complaint ¶¶ 8, 34-36 (hazardous substances), 9, 29 (facility), 29-31 (environment), 30-31 (release)), *with* CERCLA definitions in 42 U.S.C. §§ 9601(8) ("environment"), (9) ("facility"), (14) ("hazardous substance"), (22) ("release"). Though *Barnes* did not address a statute of repose, its reasoning would apply section 9658 on these facts and further calls into question the earlier Fifth Circuit decision in *Burlington Northern* that Petitioner depends on for a circuit split.

The legislative history is indeed "unusually helpful" as *Barnes* states, for the House Conference Report noted that section 9658 was meant to "address the problem identified in the" Study Group Report, which is that "certain State statutes deprive plaintiffs of their day in court." H.R. CONF. REP. 99-962, 1986 U.S.C.C.A.N. 3276, 3354. The narrow "simple reading" advanced by Petitioner, however, as the decision below recognized, would deprive plaintiffs in states with statutes of limitation containing repose provisions of their day in court.

Finally, this case is not a perfect vehicle for this Court. This case is only one part of a long-running dispute about how to clean up the mess left behind by Petitioner. The EPA previously entered into a consent order regarding the site with Petitioner and the subsequent landowner, J.A. 190-221, and the North Carolina Department of Environment and Natural Resources has also made certain demands of Petitioner. Petitioner sued the subsequent landowner over the costs of responding to the agencies, and that lawsuit is ongoing. *See CTS Corp. v. Mills Gap Road Assocs.*, No. 1:10-CV-156-GCM, 2013 WL 4499136 (W.D.N.C. Aug. 20, 2013) (granting defendant's amended motion for partial summary judgment).

Coincidentally, the Eleventh Circuit will soon hear argument on the exact same issue Petitioner has raised – indeed, involving the exact same ten-year limitations period in N.C. Gen. Stat. § 1-52(16). *See Bryant v. United States*, No. 12-15424 (11th Cir. to be argued Jan. 17, 2014). *Bryant* involves numerous United States Marines and family members who developed leukemia and other cancers more than ten years after being exposed, at Camp Lejeune in North Carolina, to the worst public water contamination in United States history. If the Eleventh Circuit were to hold that section 9658 does not preempt the ten-year limitations period in N.C. Gen. Stat. § 1-52(16), a meaningful circuit split would then exist. But for now, the Court should continue to allow the interpretation of section 9658 to percolate in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF

Respondents cannot and do not deny that there is a 2-2 division of authority on the question presented. As Respondents themselves recount (Br. in Opp. 12-13), the Ninth Circuit and the divided Fourth Circuit panel below have held that 42 U.S.C. § 9658 preempts state statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008); Pet. App. 16a. And, as Respondents also acknowledge (Br. in Opp. 9-11), the Fifth Circuit and the Supreme Court of South Dakota have held the opposite. *See Burlington N. & Santa Fe Ry. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005); *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 417 (S.D. 2008). Thus, this case poses a clear split on a recurring question of federal law.

Instead of disputing the existence of the 2-2 split, Respondents suggest that the split is not yet "meaningful" and that it should be left to "percolate." Br. in Opp. 9, 22. But there is no valid reason for delay. Both sides of the split have been well ventilated, as demonstrated by the thoroughly reasoned majority and dissenting opinions in the decision below. *Compare* Pet. App. 1a-18a (majority), *with* Pet. App. 19a-36a (dissent). Moreover, the split frequently controls liability in multi-million dollar civil suits, including in the present case. *See* Pet. App. 57a.

At bottom, Respondents simply disagree with the decisions forming one half of the split. That does not remotely justify delaying review. Indeed, delay is especially unwarranted here because this case affords an ideal vehicle. This case was decided on a motion to dismiss, and there is no dispute that, absent § 9658, Respondents' state claim would be eliminated

under North Carolina's statute of repose. The petition for a writ of certiorari should be granted.

I. THE 2-2 SPLIT ON THE QUESTION PRESENTED JUSTIFIES CERTIORARI

Unable to deny that there is a 2-2 division authority on the question presented, Respondents assert that the split is (somehow) not "meaningful"—even though it frequently controls liability in multi-million dollar CERCLA suits. Respondents' arguments are unconvincing.

A. At the outset, Respondents agree (Br. in Opp. 9-11) that the Fourth and Ninth Circuits interpreted § 9658 in the same way: both held that § 9658 preempts state statutes of repose, even though § 9658 mentions only statutes of limitation. *See McDonald v. Sun Oil Co.*, 548 F.3d at 779; Pet. App. 16a. Thus, the Fourth and Ninth Circuits indisputably form one side of the 2-2 split over the meaning of § 9658.

B. After trumpeting one half of the split (the one they like), Respondents try to downplay the other half. But the effort is unavailing.

1. Respondents first argue that the Fifth Circuit's decision in *Burlington*, 419 F.3d 355, supplies a "weak basis for review," Br. in Opp. 12, even though *Burlington* squarely conflicts with Fourth Circuit and Ninth Circuit precedent. Indeed, the decision below specifically noted that it was "join[ing] the view articulated by the Ninth Circuit" and that it was "unpersuaded" by the "opposing view" of the Fifth Circuit in *Burlington*. Pet. App. 16a. And while Respondents assert that *Burlington* should be narrowed to its facts, *see* Br. in Opp. 12-13, the Fifth Circuit did not

see it that way. Its decision rested on a clear rule: "[T]he reach of the plain language of § 9658 does not extend to statutes of repose," whatever the facts of any individual case. *Burlington*, 419 F.3d at 362. That clear holding controls the scope of § 9658 in the Fifth Circuit.

Respondents also complain that *Burlington* "failed to address" and "failed to discuss" arguments that Respondents themselves view as persuasive. Br. in Opp. 13. And Respondents further assert that the Fifth Circuit issued its decision with inadequate "briefing." *Id.* at 12. This kind of quibbling again misses the point. The Fifth Circuit's *Burlington* decision was thoroughly reasoned. Indeed, the Fifth Circuit's discussion of the question presented spanned five pages, *see Burlington*, 419 F.3d at 361-65, and was repeatedly relied on by the dissenting opinion below. *See* Pet. App. 22a-23a (Thacker, J., dissenting). And regardless, what matters is that the Fifth Circuit has taken a clear position in an acknowledged circuit split. Confirming as much, district courts in the Fifth Circuit have followed *Burlington*'s clear holding. *See, e.g.*, *Coleman v. H.C. Price*, No. 11-2937, 2013 WL 64613, at *2-*3 & nn. 13-14 (E.D. La. Jan. 4, 2013) ("[T]he reach of the plain language of § 9658 does not extend to statutes of repose" (quoting *Burlington*, 419 F.3d at 362-64)). Moreover, the Fifth Circuit has adhered to its position for over eight years. Certiorari is warranted.

Respondents also note (Br. in Opp. 20-21) the Fifth Circuit's decision in *Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008). As Respondents observe, *Barnes* did not address statutes of repose and so did not speak to the question presented here. *See* Br. in

Opp. 21. Still, the reasoning of *Barnes* underscores an important point in favor of Petitioner's reading of § 9658. As *Barnes* noted, "we are to presume, absent manifest Congressional intent, that Congress did not intend broad preemption in the traditional field of state tort remedies." 534 F.3d at 365. That respect for traditional state prerogatives cuts strongly in favor of reading § 9658 not to apply to statutes of repose. *See infra* p. 7 (discussing the presumption against preemption).

2. Respondents next address the South Dakota Supreme Court's decision in *Clark County*, 753 N.W.2d 406, in which that court explicitly aligned itself with the Fifth Circuit. *See id.* at 414-17 (discussing *Burlington*, 419 F.3d at 355). As the South Dakota Supreme Court recognized, § 9658 applies only to state statutes of limitation, since Congress did not "include substantively different statutes of repose within this preemptive rule." *Id.* at 417. Even Respondents recognize that *Clark County* "followed *Burlington*" and "held that section 9658 did not preempt a state statute of repose." Br. in Opp. 13. Thus, *Clark County* joined *Burlington* on one side of the 2-2 division of authority at issue in this case.

Again unable to deny the existence of a split, Respondents resort to relitigating the merits. In particular, Respondents argue that the South Dakota Supreme Court "failed to analyze" particular arguments and that it should not even have reached the question presented. *See* Br. in Opp. 13. Again, Respondents miss the point. What matters for purposes of this Court's review is that the highest court of a state has concluded an issue of federal law in direct conflict with two federal courts of appeals. Respondents also

assert that the South Dakota Supreme Court could conceivably reverse its own precedent. *See* Br. in Opp. 13. So could the Fourth Circuit, or the Fifth, or the Ninth, some day. But for a long time now, the division has remained—and the instant decision only makes it worse. No further percolation is required. The time is now to resolve this crucial question.

In sum, the decision below explicitly joined sides in an acknowledged conflict of authority, with the Fourth and Ninth Circuits on one side and the Fifth Circuit and the South Dakota Supreme Court on the other. *See* Pet. 14-18. This clear 2-2 split warrants this Court's review.

II. CERTIORARI IS ALSO WARRANTED BECAUSE THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The Court should also grant CTS Corporation's petition because it raises an important and recurring legal issue. As Petitioners have explained, the question presented is litigated with great frequency in district courts. *See* Pet. 21 (discussing five federal district courts that have formed a 3-2 split over a single state statute of repose). But the enormous financial stakes—typically in the millions of dollars—frequently force settlement, thereby preventing many potential vehicles from reaching the courts of appeals at all. *See Id.* at 19-21. The result has been a significant federal intrusion into a paradigmatic area of traditional state regulation. *See id.*

Yet again, Respondents sidestep this important issue, and instead make the boilerplate point that disagreement among district courts is insufficient in itself to justify certiorari. Br. in Op. 14. True, but

again, beside the point. This division in the district courts—even in the same circuit—only underscores the confusion being caused by the fact that federal courts of appeals and state supreme courts *are* split 2-2 over the question presented. *See supra* pp. 2-5. Given that undisputed division of authority, both the practical importance of the question presented and the frequency with which it arises confirm that certiorari should be granted.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASE LAW

Finally, certiorari is appropriate because the Fourth Circuit's decision conflicts with bedrock principles that this Court has directed lower courts to follow when interpreting federal statutes.

A. As Respondents themselves acknowledge, both the Fourth Circuit and the Ninth Circuits started with their preferred holding, drawn from a broad view of what they perceived as "CERCLA's legislative purpose," Br. in Opp. 9; *id.* at 19-20, then worked backward to justify rewriting the statute's text. That's not how statutory interpretation is supposed to work—indeed, it is doubly erroneous.

1. As this Court has repeatedly held, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *see also Kucana v. Holder*, 558 U.S. 233, 252 (2010). Statutes are the product of numerous cross-cutting legislative objectives, and the Congresses that enacted CERCLA and its later amendments clearly chose not to advance its remedial purpose in all pos-

sible ways. For example, Congress specifically rejected a number of remedial proposals advanced by the Study Group. *See* Pet. 26. Here, § 9658 furthers remedial purposes insofar as it preempts statutes of limitations. It does not go so far as to preempt statutes of repose, any more than it indiscriminately imposes CERCLA liability on any person who happens to occupy land adjacent to a CERCLA site. Both would advance broad remedial purposes; neither is the law. By allowing its own conception of statutory purpose to trump statutory text, the decision below contravened this Court's precedents.

2. The decision below also flouts the presumption against preemption—a settled rule of construction that Respondents do not even mention. *See, e.g.*, *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Even assuming that Respondents were correct that § 9658 is "ambiguous" as to the question presented, Br. in Opp. 9, that ambiguity should be resolved not by recourse to judicially guessed "purposes," but rather through application of settled canons of construction. Here, this Court's presumption against preemption dictates rejection of Respondents' position.

B. Tacitly recognizing that the decision below erred by elevating statutory purpose over statutory text, Respondents also offer pseudo-textual arguments not relied on by the decision below. In so doing, Respondents—unlike the decision below—

correctly recognize that "a statute's terms should be given the meaning that they had when the text was adopted," in 1986. Br. in Opp. 17. But there is a reason that the decision below did not rely on this mode of analysis: it's fatal to the majority's holding. For, as the dissent demonstrated, attention to historical context refutes Respondents' view of § 9658.

The consensus view when § 9658 was enacted was that the term "statutes of limitation" had a specific meaning. It referred to laws that extinguish a claimant's right to pursue a cause of action after a certain period of time following accrual. Given that consensus meaning, § 9658 does not apply to statutes of repose, which abolish causes of action after a period of time, regardless of whether a claim has accrued.

Respondents also raise various arguments purporting to show that the terms "statutes of repose" and statutes of limitation" are interchangeable. But, as one might guess from looking at how different these words appear on a page, these arguments are unpersuasive.

1. Respondents point to various judicial decisions that, in Respondents' view, use the term "statutes of repose" as an umbrella term that encompasses "statutes of limitation." *See, e.g.*, Br. in Opp. 17 (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). But this point misses the crucial context. What matters is not what the Norman French, the drafters of Magna Carta, or even Blackstone or Chief Justice Marshall would have thought on this score. What matters is the prevailing view *at the time* of § 9658's enactment. *See* Pet. 24-25. And, again, this is all really beside the point, because Respondents would not prevail *even if* the term "statutes of repose" were

read to encompass statutes of limitation. Because § 9658 refers to "statutes of limitation," the key issue is whether *that* term would have been read broadly to encompass statutes of repose in 1986. The overwhelming weight of evidence suggests that the answer is no. As Petitioners have explained, the term "statutes of repose" was once used as an umbrella term that encompassed statutes of limitation. *See* Pet 24. But, during the 1980s, the term "statutes of limitation" acquired a more specific meaning limited to laws that extinguished causes of action after the claim's accrual.

2. Perhaps most curiously, Respondents cite the 1979 edition of *Black's Law Dictionary*. Br. in Opp. 17. Again, Respondents entirely ignore the analysis in the dissenting opinion below, which showed that recourse to *Black's Law Dictionary* strongly supports Petitioners. *See* Pet. App. 24a-26a (Thacker, J., dissenting). As the dissenting opinion explained, modern editions of *Black's Law Dictionary* cleanly distinguish between statutes of limitations and statutes of repose. *See id.* The 1979 edition, published seven years before § 9658's enactment, had not fully adopted the modern definitions, and so still viewed statutes of limitation as a subset of statutes of repose. *See Black's Law Dictionary* 835 (5th ed. 1979) ("Statutes of limitation are statutes of repose."). Yet the converse was not true. That is, by 1979 the phrase "statutes of limitation" already had a specific meaning: it encompassed laws "declaring that no suit shall be maintained on such causes of action . . . unless brought within a specified period of time *after the right accrued*." *Id.* (emphasis added). That specific meaning excluded what we would now call statutes of repose.

3. Finally, Respondents assert that aspects of § 9658's legislative history treated the terms "statute of repose" and "statute of limitations" interchangeably. *See* Br. in Op. 18. Even assuming that legislative history could overcome clear statutory text, *but see Milner v. Department of Navy*, 131 S. Ct. 1259, 1266 (2011) ("We will not . . . allo[w] ambiguous legislative history to muddy clear statutory language."); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (explaining that a legislature's "authoritative statement is the statutory text, not the legislative history"); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."), the sources that Respondents identify actually undercut their position. Indeed, Respondents once more ignore the cogent analysis of the dissenting judge below. *See* Pet. App. 31a-32a (Thacker, J., dissenting). According to Respondents, a Study Group Report influenced the House Report and, ultimately, the drafting of § 9658. *See* Superfund Section 301(e) Study Group, 97th Cong., *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies* (Comm. Print 1982). Yet the Study Group Report advanced distinct proposals for "statutes of limitations" and for "statutes of repose." *See id.* at 24-42. Indeed, the Study Group Report proposed a special discovery rule for statutes of limitation, but the complete *elimination* of statutes of repose. *See id.* Congress adopted the first of these recommendations while rejecting the second. Thus, the Report "put Congress on notice that statutes of limitations are distinct time-bars, separate from statutes of repose."

Pet. App. 32a (Thacker, J., dissenting). Respondents' recourse to legislative history only reconfirms the distinction between statutes of limitations and statutes of repose.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, certiorari is particularly appropriate because this case presents an ideal vehicle to resolve the question presented. Indeed, there is no dispute that the question presented is outcome-determinative, and that Respondents' suit may proceed *only if* the decision below correctly interpreted § 9658 to preempt N.C. Gen. Stat. § 1-52(16). Further, there is no dispute that N.C. Gen. Stat. § 1-52(16) is a statute of repose, not a statute of limitations. *See* Pet. App. 10a, 19a, 38a, 44a; *see also Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same). Respondents' appeal in the Fourth Circuit addressed only the question presented.

Respondents do not dispute the advantages of granting review in this case. Nor do Respondents identify any vehicle problems. Instead, Respondents suggest that this case is "not a perfect vehicle" because it "is only one part of a long-running dispute." Br. in Opp. 22. Surely, that is true of every case this Court agrees to hear. It does not answer the "when to hear the matter" question. Typically, that time comes when the dispute is sufficiently crystallized and all relevant sides have been aired. Indeed, that moment frequently comes with splits shallower and

less mature than this one. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012) (identifying a two-year-old, 1-1 split); *Chase Bank USA, NA v. McCoy*, 131 S. Ct. 871, 877 (2011) (also identifying a two-year-old, 1-1 split). Here, with two courts going one way, two the opposite, and a dissent in this case crossing over to the opposing territory, not to mention myriad district courts in deep and protracted confusion, no beneficial purpose would be served by waiting any longer.

Finally, as a last gasp, Respondents indicate that another case with this issue is working its way through the lower courts and speculate that it could potentially address the question presented here. *See* Br. in Opp. 22. Again, surely, that's always the case when this Court grants certiorari. But while Respondents clearly have good reason to hope that this Court waits for another case, they have not shown why any other vehicle either would or could be superior to this one. And even if another court of appeals *did* address the question presented, that would only make the split even deeper, thereby providing even more reason for this Court's review, with precious months or years lost, and attendant multi-million dollar uncertainty, left to reign in the meantime. Nothing recommends that course.

CONCLUSION

The petition for a writ of certiorari should be granted.

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit correctly interpret 42 U.S.C. § 9658 to apply to state statutes of repose in addition to state statutes of limitations?

PARTIES TO THE PROCEEDING

The plaintiffs in this case are Respondents Peter Waldburger, Sandra Ratcliffe, Lee Ann Smith, Tom Pinner, IV, a/k/a Bud Pinner, IV, Hans Momkes, Wilma Momkes, Walter Dockins, Jr., Autumn Dockins, William Clark Lisenbee, Dan Murphy, Lori Murphy, Robert Aversano, Daniel L. Murphy, Laura A. Carson, Glen Horecky, Gina Horecky, Renee Richardson, David Bradley, Byron Hovey, Ramona Hovey, Peter Tatum MacQueen, IV, Bethan MacQueen, Patricia Pinner, Tom Pinner, III, a/k/a Buddy Pinner, III, and Madeline Pinner.

The defendant is Petitioner CTS Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner CTS Corporation is a publicly held corporation. It does not have any parent corporations. GAMCO Asset Management, Inc., a wholly owned subsidiary of GAMCO Investors, Inc., owns 10% or more of CTS Corporation's stock.

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The decision of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-36a) is reported at 723 F.3d 434. The unreported decision of the United States District Court for the Western District of North Carolina (Pet. App. 37a-39a) is available at 2012 WL 380053. The unreported memorandum and recommendation of the magistrate judge (Pet. App. 40a-47a) is available at 2011 WL 7153937.

JURISDICTION

The Fourth Circuit issued its opinion reversing the district court's final judgment on July 10, 2013. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at issue in this case provides in full:

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally

required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607 — Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions — As used in this section—

(1) Subchapter I terms — The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period — The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were

caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules — In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658.

STATEMENT

A. Two Distinct Types of Statutes: Statutes of Limitations and Statutes of Repose

At the heart of this case is a fundamental difference between two types of statutes. Statutes of *limitations* establish "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). These statutes begin to run from a date connected to the *plaintiff*—asking when the plaintiff is injured, or when the plaintiff learned or should have learned of the injury and, perhaps, its cause. Statutes of limitations are procedural, designed to encourage litigants to assert their rights promptly. They are also frequently subject to equitable exceptions (*e.g.*, equitable tolling). *See generally Police & Fire Retirement Sys. v. IndyMac*

MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F. 2d 862, 866 (4th Cir. 1989).

Statutes of *repose*, by contrast, bar "any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1546 (9th ed. 2009). Unlike statutes of limitations, statutes of repose are linked to the *defendant* and begin to run from the date of the defendant's allegedly tortious conduct or some other specified event, regardless of whether a cause of action has accrued. *See generally* 54 C.J.S. Limitations of Actions § 7 (2013). Because they are substantive, not procedural, they are not generally subject to the various exceptions associated with statutes of limitations. Instead of encouraging claimants to act promptly, statutes of repose assure potential defendants that liability for any particular action cannot lie after a prescribed period of time.

B. CERCLA § 9658: How It Works

Against this backdrop of two distinct statutes sits CERCLA § 9658, which addresses state-law damages actions for exposure to hazardous substances. 42 U.S.C. § 9658. This unusual provision engrafts a special *federal* commencement date onto the running of *state* statutes of limitations governing *state* causes of action. This federal intrusion into state procedural law applies to any state action for "personal injury, or property damages" that arises from a "hazardous substance, or pollutant or contaminant, released into the environment from a facility." *Id.* § 9658(a)(1). For these qualifying state-law actions, § 9658

preempts certain state commencement dates that would have otherwise applied under the state statutes of limitations, and provides in their place a federal commencement date.

Specifically, the general rule under § 9658 is that "the statute of limitations established under State law shall apply." 42 U.S.C. § 9658(a)(2). However, § 9658(a)(1) carves out an exception to that general rule:

> [I]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

§ 9658(a)(1). In other words, if the state-law "applicable limitations period" starts earlier than the federal commencement date, then the federal commencement date controls.

Significantly, § 9658 incorporates several mutually reinforcing references to the phrase "statutes of limitations." First, the text of § 9658(a)(1) itself applies to "the applicable limitations period for such action (as specified in the State statute of limitations or under common law)." Second, the phrase "applicable limitations period" is separately defined as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." § 9658(b)(2). And, finally, the phrase "commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." § 9658(b)(3).

Thus, § 9658(a)(1) by its terms acts only on "statutes of limitations," as opposed to other time limitations.

How it works confirms as much, as the statute's preemptive effect is defined in part by a comparison of relevant "commencement" dates. Specifically, if the "applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." *Id.* And § 9658 defines the "applicable limitations period" that it covers as the "period specified in a statute of limitations during which" the qualifying state claims may be brought. *Id.* § 9658(b)(2).

The "federally required commencement date" is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." § 9658(b)(4)(A). This type of accrual provision for statutes of limitations is generally referred to as a "discovery rule," since it runs from the date of the plaintiff's actual or reasonable discovery of a particular fact. And it is actually an "enhanced discovery rule" because, under § 9658, the relevant facts to be discovered are not just the existence of the plaintiff's injury, but also its cause.

Like North Carolina, most states have statutes of limitations that begin to run when the plaintiff's "bodily harm" or "physical damage" "becomes apparent or ought reasonably to have become apparent to

the" plaintiff. N.C. Gen. Stat. § 1-52(16). Moreover, many states have statutes of limitations that begin to run from the time of injury. So, in place of these triggering events, § 9658 delays the commencement of the state statutes of limitations until "the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). Accordingly, for such statutes this federal discovery rule is more plaintiff-friendly than the State's own rule, as it does not trigger a state statute of limitations until the plaintiff knows of (or reasonably should have known of) *both* the injury *and* the causal connection between the injury and the alleged hazardous substance at issue.

The statute also codifies "[s]pecial rules" for cases involving "a minor or incompetent plaintiff," which are all equitable exceptions typically found in statutes of limitations, not statutes of repose. § 9658(b)(4)(B). In the case of a minor, the federal commencement date is "the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed." § 9658(b)(4)(B)(i). And, in the case of an incompetent individual, the federal commencement date is the date "on which such individual becomes competent or has had a legal representative appointed." § 9658(b)(4)(B)(ii).

C. The District Court Ruled That § 9658 Preempts Only The Commencement Of Statutes of Limitations

According to the complaint's allegations, over several decades, CTS of Asheville, Inc., operated a plant

in Asheville, North Carolina, that manufactured electronic components. Pet. App. 51a. As part of the manufacturing process, CTS of Asheville used and stored various solvents at the plant. *Id.* In 1983, CTS of Asheville was dissolved, and Petitioner CTS Corporation took over the plant's operations under its Asheville Division. *Id.* at 52a. CTS Corporation operated the plant for two years, and eventually sold the property in 1987. The buyer then sold the unimproved portion of the property to a developer that built houses on the mountainside overlooking the former plant site. Pet. App. 53a-54a. Respondents—a group of individuals that purchased houses on or near the former CTS property—"contend that their land and ground water is contaminated by the toxic chemicals . . . that CTS Corporation left at the Facility when it sold the property." *Id.* at 41a.

In February 2011, Respondents filed a one-count complaint against CTS Corporation alleging that it had violated North Carolina's nuisance law. *Id.* at 55a-57a. Respondents sought monetary damages and a judgment requiring CTS Corporation to engage in reclamation of the toxic solvents and remediation of the environment around the former plant site. *Id.* at 57a. CTS Corporation moved to dismiss the complaint on the ground that North Carolina's 10-year statute of repose had eliminated Respondents' nuisance claim long before they brought this suit. *See* N.C. Gen. Stat § 1-52(16) (prohibiting a "cause of action [from] accru[ing] more than 10 years from the last act or omission of the defendant giving rise to het cause of action").

A magistrate judge recommended that the district court grant CTS Corporation's motion to dismiss.

Pet. App. 40a. The magistrate judge initially noted that a 3-year *statute of limitations* governs North Carolina nuisance claims, and begins to run once "'bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant.'" Pet. App. 43a (quoting N.C. Gen. Stat. § 1-52(16)). But also applicable was a 10-year *statute of repose*, which indicates that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Pet. App. 44a (quoting N.C. Gen. Stat. § 1-52(16)). Because "[t]he last possible act or omission by Defendant CTS Corporation that could give rise to a cause of action occurred in 1987 when it sold the property," the magistrate judge reasoned, Respondents' nuisance claim was "barred by the statute of repose contained in N.C. Gen. Stat. § 1-52(16)." *Id.*

The magistrate judge rejected Respondents' arguments for avoiding this statute of repose. As relevant here, the magistrate judge specifically rejected Respondents' argument that § 9658 engrafts its federally-mandated commencement date not only onto North Carolina's 3-year statute of limitations, but also onto its 10-year statute of repose. Pet. App. 46a. Relying on the Fifth Circuit's decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005), the magistrate judge reasoned that "[t]he clear language of the statute . . . is limited to a state's statute of limitations," not a state's statute of repose. Pet. App. 46a.

The magistrate judge noted the well-known substantive differences between the two types of statutes. On the one hand, "'[a] statute of repose is a

substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit.'" Pet. App. 47a (quoting *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 446 S.E.2d 603, 605 (N.C. Ct. App. 1994)). On the other, a statute of limitations is a "'procedural device that operates as a defense to limit the remedy available from an existing cause of action.'" *Id.* (quoting *First United*, 882 F.2d at 865).

The district court subsequently adopted the magistrate judge's recommendation and entered final judgment for CTS Corporation. Pet. App. 39a. The court described the "magistrate judge's analysis of CERCLA's preemption of state statutes of limitations, as opposed to statutes of repose" as "accurate and well-reasoned." *Id.* at 38a. And the court found the Ninth Circuit's contrary holding—that CERCLA preempted both statutes of limitation and statutes of repose—to be "flawed." *Id.* (disagreeing with *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008)). Section 9658's plain language applies only to state statutes of limitations, the court explained, so the "*McDonald* court created an ambiguity where none existed." *Id.*

D. The Court Of Appeals Read § 9658 To Preempt Statutes Of Repose Because Of CERCLA's Supposed "Remedial Purpose"

A divided panel of the Fourth Circuit reversed. Pet. App. 1a, holding that "the discovery rule articulated in § 9658 . . . preempts North Carolina's ten-year limitation" in N.C. Gen. Stat. § 1-52(16). Pet. App. 2a. The majority began with a summary of how § 9658 came to be. Congress passed CERCLA in 1980 against the backdrop of well-publicized environmental disasters. Pet. App. 2a-3a. The majority

thus described CERCLA as "a remedial statute" designed to abate hazardous waste sites and to shift the costs of cleanup to responsible parties. *Id.* at 3a-4a. The majority also noted that CERCLA reflected a compromise between three separate bills and, as a result, the text of "CERCLA is often criticized for its lack of precision." *Id.* at 3a.

After CERCLA's initial enactment, Congress "established a study group to examine the 'adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment.'" *Id.* at 4a (quoting 42 U.S.C. § 9651(e)(1)). The study group determined that environmental claims frequently have long latency periods that are not suited for statutes of limitations that run from the time of the plaintiff's injury. Pet. App. 4a-5a. The study group recommended to the states that they "'adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause,'" and "'repeal . . . statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one.'" *Id.* at 5a (quoting Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies pt. 1, at 241 (Comm. Print 1982)). In 1986, the majority opined, Congress intervened by passing § 9658 instead of waiting for the states to amend their state laws. *Id.*

The majority next "review[ed] the concepts of limitations and repose." Pet. App. 9a. It noted that both limit the time that a plaintiff has to bring suit. A

statute of limitations "'bars claims after a specified period . . . based on the date when the claim accrued (*as when the injury occurred or was discovered*),'" and is designed to discourage plaintiffs from sitting on their rights while evidence is lost. *Id.* at (quoting *Black's Law Dictionary* 1546 (9th ed. 2009) (emphasis added)). A statute of repose, by contrast, "'bar[s] any suit that is brought after a specified time *since the defendant acted* . . . even if this period ends before the plaintiff has suffered a resulting injury'" and before the claim accrues. *Id.* (quoting *Black's Law Dictionary* at 1546 (emphasis added)). A statute of repose's grant of substantive immunity is designed to balance the interests of plaintiffs and defendants by setting a time limit beyond which no liability exists. *Id.* The majority concluded that the 10-year period at issue in this case was a statute of repose under these general definitions, as the North Carolina courts themselves had repeatedly held. *Id.* at 10a-11a.

Only then did the majority turn to the language of § 9658. As the majority candidly acknowledged, the phrase "statute of limitations" appears in the statute "five times," and "[n]oticeably absent is the phrase 'statute of repose.'" Pet. App. 11a-12a. "Thus," the majority conceded, "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations." *Id.* at 12a.

But the majority did not rest on that simple conclusion. Pet. App. 11a-12a. Instead, the majority concluded that the provision was ambiguous as to whether Congress meant the phrase "statute of limitations" to encompass statutes of repose. *Id.* at 11a. That ambiguity, the majority reasoned, came in part

from the fact that the statute of repose at issue here appears in a section of the North Carolina Code entitled "Limitations, Other than Real Property," so it could be interpreted to fall within § 9658(a) because it was "'specified in the State statute of limitations or under common law.'" Pet. App. 12a. The majority also suggested that the statute of repose could be read to qualify under § 9658(b)'s definition of "applicable limitations period" because it was a "period," "specified in a statute of limitations," "during which a civil action . . . may be brought." *Id.* Finally, because the statute of repose began to run at the time of the defendant's last action, the majority found that its "commencement period" was earlier than the federal commencement date and could be interpreted to trigger that delayed date. *Id.* at 12a-13a.

Self-consciously desiring to avoid the appearance that it was "stretching to find ambiguity in the text," the majority provided two additional rationales to support its view that the phrase "statute of limitations" could include "statute of repose." Pet. App. 13a. It suggested that "a historical analysis reveals that both scholars and courts have often used the terms interchangeably." *Id.* Given this confusion, the majority found it probable that Congress intended for statute of limitations to cover statutes of repose. *Id.* Additionally, the majority opined that there is a "lack of internal consistency" between § 9658's substantive provision (§ 9658(a)(1)) and its definitional provision (§ 9658(b)(2)). *Id.* The substantive provision indicates that it applies to an "applicable limitations period" "as specified in the State statute of limitations or under common law." The definition of "applicable limitations period," by contrast, defines the phrase as "the period specified in a

statute of limitations" without reference to the common law. Pet. App. 13a-14a. The majority thus concluded that § 9658 failed to manifest a plain meaning when state common law (rather than state statutory law) establishes the relevant limitations period. *Id.*

The majority went on to resolve this perceived ambiguity by holding that § 9658 preempts the commencement dates in state statutes of repose. It relied on three factors. First, it cited the study group's recommendations—which were "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." Pet. App. 14a. Second, it cited CERCLA's "remedial" nature, opting for a "broad interpretation" of "statute of limitations" to further the statute's remedial goals. *Id.* at 15a. Third, it cited the Ninth Circuit's *McDonald* decision, noting that it was "unpersuaded" by the Fifth Circuit's contrary analysis regarding the plain meaning of § 9658's text. *Id.* at 16a.

The majority concluded by conceding that its holding may "raise the ire" of "corporations and other entities" that rely on statutes of repose, but explained that it had not turned a "blind eye" to the policies that these statutes vindicate. *Id.* After all, the majority noted, a plaintiff still must meet its burden of proof on the merits, which will prove more difficult as time passes. *Id.* at 17a. And, while the majority's holding effectively eliminated the statute of repose by starting it and the statute of limitations at the exact same time, the 3-year period still applied so "defendants will not necessarily be endlessly subjected to the possibility of litigation." *Id.* Finally, the majority ex-

pressed again that its holding comported with the study group's recommendations. *Id.*

Judge Davis, in a short concurrence, opined that § 9658's "plain language" need not establish an ambiguity if other tools of statutory interpretation proved that an ambiguity existed. Pet. App. 18a.

Judge Thacker, however, dissented. Pet. App. 19a-37a. Beginning with § 9658's plain language, the dissent rejected the majority's argument that the phrase "statute of limitations" was ambiguous in 1986 when Congress adopted § 9658. The dissent recognized the "modern vintage" of the differences between "statutes of limitations" and "statutes of repose." *Id.* at 24a. But this did not help the majority. Historically, statutes of limitations were "considered, along with other statutory time-bars, to provide repose to litigants and were thus, generally, statutes of repose." *Id.* at. 24a. In 1986, therefore, "the only possible ambiguity may have been the meaning of 'statute of repose' and whether that term had fully matured into its modern definition"—no longer including statutes of limitations. Pet. App. 26a. There had, by contrast, never been any ambiguity on the narrower scope of the phrase "statute of limitations"—the phrase actually used by § 9658.

In addition, the dissent noted that the majority's holding made § 9658 unworkable. "Importantly, the commencement date is defined as the *beginning* of the period in which a civil action may be brought." Pet. App. 28a-29a (citing 42 U.S.C. § 9658(b)(2)-(3)). But statutes of repose like North Carolina's do not create a beginning point when a claim may be brought; they create an outer limit *whether or not* the claim could have been brought before that limit

runs. *Id.* As such, "[b]ecause North Carolina's statute of repose does not create the beginning of the applicable limitations period, § 9658 cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement." *Id.* at 29a.

While recognizing that the court need not look to legislative history because the plain language must control, the dissent also observed that the relevant legislative history supported its "conclusion that Congress was aware that statutes of limitations were a distinct category of time-bar statutes and specifically chose only to preempt those statutes and not other statutory time bars such as statutes of repose." *Id.* Specifically, the study group's report (on which the majority had relied) expressly distinguished between statutes of limitations and statutes of repose, recommending changes to *both* types of statutes. *Id.* at 31a. That the very recommendations underlying § 9658 distinguished these two kinds of statutes illustrates that Congress could not have been confused about their separate meanings. *Id.* at 32a.

The dissent bolstered this interpretation with two canons of statutory interpretation. For one thing, the dissent explained that "the role of legislative compromise" should play a part in § 9658's interpretation. *Id.* The study group recommended a host of procedural reforms to state tort claims, but Congress, through § 9658, adopted only the recommendation concerning statutes of limitations. *Id.* at 34a. By doing so, Congress struck "a balance between harmonizing certain procedural matters in toxic tort cases and allowing states to continue to regulate their own substantive areas of law." *Id.* at 34a-35a. The majority frustrated this compromise (and the legislative in-

tent) by departing from the plain language and expanding the reach of the statute.

For another, this case "arises in the context of federal preemption," so the long-standing presumption against preemption should apply. *Id.* at 35a. "Just as [courts] presume 'Congress does not cavalierly preempt state-law causes of action[,]' [the courts] should also presume that Congress does not cavalierly preempt state substantive rights to be free from those state-law causes of action." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This general presumption weighed against giving § 9658 an overly broad preemptive effect. *Id.* at 35a-36a.

Since issuing its decision, the Fourth Circuit has stayed its mandate pending this Court's ruling.

SUMMARY OF ARGUMENT

The statute's plain text resolves this case. On its face, § 9658 does one thing and one thing only: it postpones a state-law "commencement date"—that is, a date when, under state law, a suit "may be brought." § 9658(b)(1)-(2). That approach makes perfect sense if § 9658 is read according to its terms to apply only to statutes of limitations, which run from the date when a plaintiff's cause of action accrues. But § 9658 cannot sensibly apply to statutes of repose, which do not have commencement dates within the meaning of § 9658. Instead, statutes of repose run from the date of the defendant's conduct and can expire even if the plaintiff has yet to suffer an actionable injury. *Id.* Because § 9658 only postpones the state "commencement date," it cannot possibly affect statutes of repose.

Confirming as much, § 9658 repeatedly states that it preempts only a singular time period, thereby precluding the possibility of preempting two separate time periods (one for the statute of limitations, the other for the statute of repose). Faced with a choice between reading § 9658 to preempt statutes of limitations *or* statutes of repose, the answer is self-evident. Moreover, there can be preemption under § 9658 only *if* there is a state-law "commencement date" that is *earlier* than the "federally required commencement date." But that necessary triggering event does not occur when a State's statute of repose has *already* run before the plaintiff's action accrues. Once the applicable statute of repose has expired, there can be no state "commencement date" at all, since there can be no date when, under state law, a "civil action . . . may be brought." § 9658(b)(1)-(2).

The meaning of § 9658 only becomes clearer when viewed in the historical and statutory context in which it was enacted. In 1986, dictionaries, treatises, and cases routinely distinguished statutes of limitations and statutes of repose. Reflecting older usage, some cases used the phrase "statutes of repose" as an umbrella term encompassing statutes of limitations. But the converse was not true. That is, the phrase "statutes of limitations" was widely recognized *not* to encompass what we now call statutes of repose. Moreover, tort law had just undergone a major change, whereby relatively permissive "discovery rules" were adopted for statutes of limitations, thereby prompting the enactment of statutes of repose. Given that legislative environment, it would be perverse to assume that Congress used a recognized term of art to encompass a separate legal concept. Moreover, Congress commissioned a study group to

investigate issues related to § 9658, and the resulting report expressly distinguished statutes of limitations and statutes of repose. Indeed, the study group expressly addressed the North Carolina laws at issue in this case, and concluded that the State's "limitations period" was the three-year statute of limitations.

Even if § 9658 were viewed as ambiguous, it *still* should not preempt state statutes of limitations. When preemption provisions like § 9658 can be read either broadly or narrowly, respect for the independent sovereignty of states counsels in favor of the narrower view. Therefore, under federalism principles and the well-settled presumption against preemption, any ambiguity in § 9658 should be construed against broad preemption of state legislation in an area of traditional state concern. Further, federal preemption of state statutes of repose would raise a serious constitutional question. Because statutes of repose demarcate the bounds of *substantive* tort liability, federal preemption of those laws would effectively command states to treat certain conduct as tortious as a matter of state law. To avoid the serious political accountability problems that would result, § 9658 should be read to avoid this question.

The panel majority plainly erred in concluding that § 9658 preempted state statutes of repose. Even though it conceded that "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations," the majority below rejected that conclusion. Pet. App. 12a. But as the decision below itself acknowledged, its pseudo-textual arguments "seem[ed] to be stretching to find ambiguity in the text." *Id.* at 13a. To overcome this acknowledged

problem, the decision below referenced historical research contained in the footnotes of another court-of-appeals decision. But that evidence actually *supported* the inference that, when § 9658 was enacted, the phrase "statutes of limitations" was not thought to encompass statutes of repose.

Even after straining to find § 9658 ambiguous, the majority below committed a separate error by resting on the statute's supposed "remedial purpose," even though § 9658—like all statutes—in fact reflects a balance of competing interests and purposes. The resulting analysis culminated in a freewheeling policy discussion that overlooked the serious threats to justice that result from litigating stale cases with incomplete facts. In the end, the decision below paid lip service to the reasons for having statutes of repose by blithely noting that, under its holding, "defendants will not *necessarily* be endlessly subjected to the possibility of litigation." *Id.* at 17a (emphasis added).

This Court should enforce the plain meaning of § 9658 by reversing the judgment below.

ARGUMENT

I. CERCLA § 9658 UNAMBIGUOUSLY APPLIES ONLY TO STATUTES OF LIMITATIONS, NOT STATUTES OF REPOSE

As this Court has explained, the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, consideration of CERCLA's text, context, and structure demonstrates that § 9658 preempts only the commencement of state "statutes of limitations," not statutes of repose.

A. "Statutes of Limitations" Are Fundamentally Different From "Statutes of Repose"

This case is about a fundamental difference between two types of statutes. A *statute of limitations* is "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Black's Law Dictionary* 1546 (9th ed. 2009). By contrast, a *statute of repose* is a "statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Id.* As these definitions make clear, statutes of limitations begin to run from a date connected to the *plaintiff*, such as when the plaintiff is injured, or when the plaintiff learned or should have learned of the injury and, perhaps, its cause. *See id.* Statutes of repose, on the other hand, are typically linked to the *defendant* and begin to run from the date of the defendant's allegedly tortious conduct or some other specified event, regardless of whether a cause of action has accrued. *See generally* 54 C.J.S. Limitations of Actions § 7 (2013).

These two types of time periods differ in their nature and purpose. Statutes of limitations are procedural, in that they are designed to encourage litigants to assert their rights promptly. *See generally IndyMac MBS, Inc.*, 721 F.3d at 106. Under the so-called "traditional rule," a tort statute of limitations begins to run when a claimant is injured. Under a "discovery rule," by contrast, a statute of limitations begins to run when the claimant knew or should have known of either the injury or (for "liberal" discovery

rules) the cause of the injury. Because they determine when individuals can assert their substantive rights, statutes of limitations are procedural in nature and are subject to equitable exceptions, such as equitable tolling. *See generally id*; *First United*, 882 F.2d at 866.

A statute of repose, by contrast, establishes the period of time when a cause of action ceases to exist, regardless of whether the claim has accrued. Because they demarcate the existence of tort liability, statutes of repose are substantive and are not generally subject to equitable exceptions or treated as retroactively applicable. Instead of encouraging claimants to act promptly, statutes of repose assure potential defendants that liability for any particular action cannot lie after a prescribed period of time. To achieve that purpose, statutes of repose run from the time of the defendant's action, thereby ensuring that every individual eventually obtains repose. *See generally Bolick v. American Barmag Corp.*, 293 S.E.2d 415, 420 (N.C. 1982).

B. The Plain Text and Structure of § 9658 Demonstrate That It Applies Only To "Statutes of Limitations"

On its face, § 9658 unambiguously postpones only the state "commencement date" provided by the applicable state statutes of limitations—not the date on which a statute of repose begins to run.

Under § 9658, a "commencement date" is the "beginning of the applicable limitations period," which in turn is "the period . . . during which a civil action . . . may be brought." § 9658(b)(2)-(3). Those terms and definitions make perfect sense in connection with statutes of limitations, since a plaintiff's ability to

bring a suit does indeed commence on the date that the statute of limitations begins to run: the action's accrual *both* starts the statute of limitations *and* allows the plaintiff to commence litigation. Thus, § 9658 does one thing and one thing only: it postpones a state-law "commencement date," as defined in the state statute of limitations.

Because it does nothing more or less than postpone a "commencement date," § 9658 cannot affect state statutes of repose. A statute of repose does not have a "commencement date" within the meaning of § 9658, since it runs from the date when the defendant's action occurs—regardless of whether a cause of action has accrued. A statute of repose does not dictate when to commence suit at the front end, but instead provides a back-end date after which the cause of action expires as a matter of substantive law. To bring suit, the plaintiff must at a minimum have suffered an actionable injury. And, particularly in cases involving latent injuries of the type addressed in § 9658, the defendant's action can take place days, months, or years before the plaintiff suffers an injury and thereby accrues a cause of action that "may be brought." § 9658(b)(2). Because it simply is not true that "a civil action . . . may be brought" when a statute of repose begins to run, *see id.*, the time to bring an action clearly does not commence when a statute of repose begins to run. Thus, the postponement described in § 9658, the definitions set out in § 9658(b)(2)-(3), and even the term "commencement date" would not make sense if they were read to apply to statutes of repose.

Everything about § 9658 confirms this result. For instance, § 9658 is written in such a way that

preemption can occur *if and only if* there is a state "commencement date" that is "earlier" than the federally required commencement date. § 9658(a)(1), (b)(2). In other words, only *if* there is an "earlier" state-law "commencement date" can *any* preemption occur. But even if § 9658's reference to "statutes of limitations" were read to encompass statutes of repose, that necessary triggering event could not possibly occur *after* a State's statute of repose had already run. Once the statute of repose has run, there can no longer be a state "commencement date" at all, since there is no date when, as a matter of state law, a "civil action . . . may be brought." § 9658(b)(2). The only circumstance where § 9658 can possibly apply is when a "civil action . . . may be brought" *before* the state statute of repose has expired. Only in that circumstance will there be "a commencement date which is earlier than the federally required commencement date." § 9658(a)(1). And, in that situation, § 9658 would postpone the state-law "commencement date" defined by the applicable statute of limitations—without having any effect on the state statute of repose.

Furthermore, the plain text of § 9658 repeatedly makes clear that it accomplishes a single substitution: as to each action, only one state-law time period is potentially replaced with a later federal-law time period. The statute provides that, in general, hazardous waste suits are governed by "*the* statute of limitations established under State law." § 9658(a)(2) (emphasis added). Further, "*the* federally required commencement date" controls if "*the* applicable limitations period for such action (as specified in *the* State statute of limitations or under common law)" is "earlier." § 9658(a)(1) (emphases add-

ed). In light of this flurry of definite articles and singular nouns, § 9658(a)(1) clearly preempts only one "applicable limitations period," *id.*, or (equivalently) one "period specified in a statute of limitations," § 9658(b)(2). In other words, § 9658 preempts and replaces a single period of time defined by state law. That indisputable meaning resolves this case, since nobody could seriously contend that the single period of time intended was the state statute of repose (where one exists). Rather, the singular period of time affected was clearly the one named five different times in the statute—namely, the period defined by the state "statute of limitations." § 9658(b)(2).

A contrary view would be irreconcilable with § 9658's repeated use of definite articles and singular nouns. To preempt *both* statutes of limitations *and* statutes of repose, Congress would have had to use language capable of encompassing multiple periods of time: one period defined by the state statute of limitations, and another defined by the state statute of repose. For example, the North Carolina statute of limitations at issue here begins to run once the plaintiff learned or should have learned about an injury, and terminates three years later. *See* N.C. Gen. Stat § 1-52(16). By contrast, the North Carolina statute of repose begins to run upon the defendant's action and terminates ten years later. *See id.* (prohibiting a "cause of action [from] accru[ing] more than 10 years from the last act or omission of the defendant giving rise to the cause of action"). Thus, each of these state laws defines a distinct period of time, with unique beginning points and end points. To encompass both of these time periods, Congress would have had to use plural nouns referring to *periods* of time.

The very operation of "the federally required commencement date" further confirms that § 9658 preempts only a single period of time. The federally required commencement date is defined by an accrual provision that is typically referred to as a "discovery rule." In particular, the federally required commencement date is generally the date on which the plaintiff discovered or reasonably should have discovered the cause of her injury or damages. *See* § 9658(b)(4). This provision operates sensibly when read, according to its terms, to preempt only statutes of limitations. Under the so-called "traditional" rule, statutes of limitations run from the date of the plaintiff's injury, and even many discovery rules run from the date when the plaintiff learned or should have learned of the injury. Those relatively stringent statutes of limitations will have commencement dates "earlier" than the federal commencement date defined in § 9658, which begins to run only when the plaintiff learns the *cause* of the injury. Under § 9658, those early commencement dates are postponed until the federally required commencement date. Indeed, early state-law commencement dates can be postponed even longer under the "[s]pecial rules," § 9658(b)(4)(B), which codify the sort of equitable exceptions long associated with statutes of limitations (and not with statutes of repose).

By contrast, an interpretation of § 9658 that somehow preempted statutes of repose—a textually incoherent result, for the reasons explained above—would clash with the detailed text of § 9658(a)(1). If the state "commencement date" were the date on which the statute of repose begins to run, then it would *always* be earlier than the date of the federal commencement date. By definition, *every* statute of

repose begins to run as soon as the defendant's action occurs, so it will always be "earlier"—or, in extraordinary cases, simultaneous with—the date when the plaintiff learns or should have learned the cause of the injury. The comparison of commencement dates that is carefully described in § 9658(a)(1) would thus have no purpose in connection with statutes of repose. A Congress that had wanted to postpone the date when statutes of repose began to run would not have done so by carefully specifying a detailed procedure that is sensible only in connection with statutes of limitations.

In sum, the text of § 9658 has a plain and straightforward meaning: state statutes of limitations that are more stringent than the federal discovery rule are supplanted by that rule. That meaning should control. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (A legislature's "authoritative statement is the statutory text, not the legislative history."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

C. When Congress Enacted § 9658, The Term "Statute of Limitations" Was Not Understood To Encompass Statutes Of Repose

The "cardinal rule of statutory construction" is that plain statutory terms should carry their plain meanings, *Molzof v. United States*, 502 U.S. 301, 307 (1992), and that rule entails adherence to the recognized meanings of legal terms of art. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). "In the absence of contrary indication, [the Court] as-

sume[s] that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). That principle supplies an independent basis to resolve this case in favor of Petitioner. At the time Congress enacted § 9658 in 1986, the phrase "statute of limitations" was a recognized term of art that did not encompass statutes of repose.

1. *Dictionaries.* Contemporaneous dictionaries recognized that statutes of limitations did not encompass what we today would term statutes of repose. *See FAA v. Cooper*, 132 S. Ct. 1441, 1449 (2012) (exploring the meaning of a legal term of art by consulting "[t]he latest edition of *Black's Law Dictionary* available when Congress enacted" the relevant provision).

In 1986, the most recent edition of *Black's Law Dictionary* was the 1979 Fifth Edition, and it defined "statute of limitations" in relevant part as a law "declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time *after the right accrued*." *Black's Law Dictionary* 835 (5th ed. 1979) (emphasis added). That definition—which predated § 9658 by seven years—accords with contemporary usage: a statute of limitation begins to run from some point "after the right [to sue] accrued." *Id.* A statute of repose, by contrast, begins to run from the time of the defendant's action, regardless of whether the plaintiff's right to sue has already accrued—or ever will. *See also The Law Dictionary* 202, 309 (6th ed. 1986) (Gilmer, ed.) (distinguishing statutes of limitations and statutes of repose).

To be sure, the 1979 *Black's Law Dictionary* also said that "[s]tatutes of limitations are statutes of repose," *id.*, but that statement simply reflected an older usage of "statute of repose" as an umbrella term for all types of time periods. In the mid-twentieth century, the term "statutes of repose" was sometimes understood—including by this Court—to be a relatively broad term, in that it encompassed what we would today call statutes of limitations as well as statutes of repose (and potentially other time limits as well). *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (referring to a statute of limitations as a statute of repose). For reasons explained below, the 1970s and 1980s saw the phrase "statutes of repose" come to assume its current, narrower meaning, such that it no longer encompasses statutes of limitations. But as the Fifth Edition of *Black's Law* demonstrates, by 1979 the term "statute of limitations"—the term that is actually in § 9658—had already come to have a narrower meaning that excluded what we would today call statutes of repose.

2. *Commentaries.* During the 1980s, prominent treatises and commentaries regularly distinguished between statutes of limitations and statutes of repose. As one leading treatise put it: "Unlike an ordinary statute of limitations, which begins running upon accrual of the claim, [the] period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." 54 C.J.S. Limitations of Actions § 4, at 20-21 (1987). That discussion—published just one year after § 9658's enactment—succinctly but definitively contrasted the two terms in precisely the way recognized by contemporary usage. Other prominent secondary materials

are to much the same effect. *See* Restatement (Second) of Torts 899 cmt. g (1979) (discussing adoption of "special 'statutes of repose'"). The fact that the meaning of these terms was rapidly crystallizing in the years leading up to § 9658's enactment was no coincidence, as explained below.

3. *Historical Context.* The distinction between statutes of limitations and statutes of repose had special salience at the time of § 9658's enactment due to nationwide trends in state legislation.

Beginning in the 1960s, states increasingly replaced the traditional statute of limitations rule—that is, that the period begins to run from the date of the injury—with more flexible discovery rules. This trend was soon accompanied by a compensatory move toward adoption of statutes of repose, in order to protect persons from being perpetually liable for all their past actions, no matter how remote in time. *See, e.g.*, *Wenke v. Gehl Co.*, 682 N.W.2d 405, 423 (Wis. 2004) ("As the courts began to modify statutory limitations by applying the 'discovery rule,' legislatures responded by enacting absolute statutes of repose.") (quoting *Reynolds v. Porter*, 760 P.2d 816, 819-20 (Okla. 1988)); *id.* ("Early treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose." (internal quotation marks omitted)); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 587 (1981). As one leading treatise put it in 1984, the "widening acceptance of the discovery rule" prompted "the great majority of states" to place "an outer time limit on negligence and related claims in certain contexts." W. Prosser & W. Keeton, *The Law*

of Torts, § 30, at 167 (5th ed. 1984). "Such statutes of 'repose,'" the authors continued, "generally supplement or override the discovery accrual rule." *Id.*; *see also* Restatement (Second) of Torts 899 cmt. g (1979) (explaining that, "[i]n recent years special 'statutes of repose' have been adopted in some states").

The interaction of these two legislative trends—one in favor of discovery rules and the other in favor of statutes of repose—explains why courts and commentators increasingly distinguished between the terms "statutes of limitations" and "statutes of repose" in the years leading up to the enactment of § 9658. Indeed, it would be no exaggeration to say that the distinction between statutes of limitations and statutes of repose was a basic feature of policy and legal debates on tort law during the 1980s.

Confirming as much, congressional proceedings increasingly included express reference to the distinction between statutes of limitations and statutes of repose. For example, during a 1979 hearing on the Uniform Product Liability Act, a Senator asked, "would you clarify for me the distinction between a 'statute of limitation' and a 'statute of repose'?" The answer tracked the modern usage, distinguishing between "procedural" statutes of limitations and "substantive" statutes of repose. *See* Uniform Product Liability Act: Hearing Before the Subcomm. on General Oversight and Minority Enterprise of the H. Comm. on Small Business, 96th Cong. 49 (1979) (colloquy between Sen. John J. LaFalce, Chairman, Subcomm. On Gen. Oversight and Minority Enterprise, and Victor E. Schwartz, Chairman, Task Force on Product Liability and Accident Compensation, Dep't of Commerce). Other statements even more closely contem-

poraneous with the 1986 enactment of § 9658 reflect awareness of the newly emerging terminological distinction between statutes of limitations and statutes of repose. *See, e.g.*, 132 Cong. Rec. 24876 (Sept. 19, 1986) (statement of Sen. Metzenbaum); 132 Cong. Rec. 9672 (May 6, 1986) (statement of Sen. Kassebaum); 125 Cong. Rec. 28678 (Oct. 17. 1979) (statement of Rep. Sensenbrenner).

4. *Judicial Decisions.* Unsurprisingly, the years leading up to § 9658's enactment in 1986 also saw many courts self-consciously explaining why they were using the term "statutes of repose" more narrowly, in order to distinguish between the two fundamentally different types of time periods. *See Bolick*, 293 S.E.2d at 417-18 ("Although the term 'statute of repose' has traditionally been used to encompass statutes of limitation, in recent years it has been used to distinguish ordinary statutes of limitation from those that begin 'to run at a time unrelated to the traditional accrual of the cause of action.'" (citation omitted)); *J.H. Westerman Co. v. Fireman's Fund Ins. Co.*, 499 A.2d 116, 119 (D.C. 1985) ("A statute of repose differs from an ordinary statute of limitations in that the specified time period begins to run not from the date on which a right of action accrues, but from another ascertainable date."); *James Ferrera & Sons, Inc. v. Samuels*, 486 N.E.2d 58, 60 (Mass. App. Ct. 1985) ("There is a marked difference between a statute of limitations and a statute of repose."); *Univ. Eng'g Corp. v. Perez*, 451 So.2d 463, 465 (Fla. 1984) (per curiam) ("A statute of repose should be distinguished from a statute of limitations."); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1985) ("As a statute of repose is not a statute of limitations[,] it

need not be pleaded affirmatively."). While some courts may have written imprecisely in cases where the nature of time limits was not at issue, the mid-1980s saw a remarkably widespread judicial consensus emerge: "statutes of limitations" were a distinctive type of time rule that was fundamentally separate from statutes of repose.

5. *Study Group Report.* Of course, legislative history cannot trump plain statutory text. *E.g.*, *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1266 (2011) ("We will not . . . allo[w] ambiguous legislative history to muddy clear statutory language."). Here, however, the context in which § 9658 was enacted only confirms that Congress was well aware of the terminological distinction between statutes of limitations and statutes of repose.

When CERCLA was first enacted in 1980 (without what is now § 9658), Congress commissioned a study group of experts to research existing tort remedies for hazardous waste (the "study group"). CERCLA, Pub. L. No. 96-510, § 301(e)(1), 94 Stat. 2767 (1980). The study group produced a detailed report and recommendations, and those documents repeatedly distinguished between statutes of limitations and statutes of repose. *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies (Comm. Print 1982). For example, the study group recommended that the States *modify* their statutes of limitations by adopting discovery rules, but that they voluntarily *repeal* many of their statutes of repose. *See id.* at 241 (recommending "repeal of *the* statutes of repose which, *in a number of states* have" unjustifiably barred claims (emphases

added)). And in observing that certain "statutes of repose" can "have the same effect as some statutes of limitations," the study group sharply distinguished between the two terms. *Id.* Thus, the study group and its report make clear that Congress was aware of the terminological difference between statutes of limitations and statutes of repose. And, in § 9658, Congress chose to address only statutes of limitations.

Making this point even clearer, the study group specifically addressed the very North Carolina timing rules at issue in this case. While noting that North Carolina had adopted a statute of repose precluding substantive liability for conduct more than ten years old, the study group specifically and repeatedly referred to the three-year discovery rule as the State's "limitations period." *See* Appendix B-9 (noting that the "period of limitations in North Carolina is three years"); Appendix B-63 (listing "3" in the column for "Limitations period"). Furthermore, the study group indicated that, because North Carolina had adopted a discovery rule, the "statute of limitations will not bar a private cause of action arising from latent personal injuries." Appendix B-10.

In sum, both the plain text and the historical context of § 9658 demonstrate that the provision pertains only to state statutes of limitations—not state statutes of repose.

II. EVEN IF § 9658 WERE AMBIGUOUS, IT STILL SHOULD APPLY ONLY TO STATUTES OF LIMITATIONS

Assuming *arguendo* that § 9658 could be read to preempt state statutes of repose, *but see supra* Part I, that reading would still be precluded by sev-

eral independent and mutually reinforcing principles of statutory interpretation.

A. Under Principles Of Federalism And The Presumption Against Preemption, Any Ambiguity In § 9658 Should Be Resolved Against Preempting Statutes Of Repose

Even if § 9658 were ambiguous, any uncertainty should be resolved based on principles of federalism and the well-settled "presumption against preemption." *See, e.g., Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

"The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). For that reason, this Court has long presumed that "Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485; *see also Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (explaining that a clear statement rule applies "when Congress intends to pre-empt the historic powers of the States"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001) ("[W]e 'work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress'" (citation and alterations omitted)). Thus, adherence to the presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

Under the presumption—which this Court has affirmed and reaffirmed—"when the text of a pre-

emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Medtronic*, 518 U.S. at 485 (likewise applying the presumption against preemption when construing an express preemption provision). In sum, it is now blackletter law that this Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230).

Here, there can be no serious question that, at the very least, § 9658 can plausibly be read, according to its terms, to apply only to statutes of limitations and not statutes of repose. Further, § 9658 impinges on state tort law—which is, clearly, "a field which the States have traditionally occupied." *Rice*, 331 U.S. at 230. Indeed, § 9658 is even more of an incursion on state sovereignty than many other federal statutes to which the presumption has been applied: not only does § 9658 nullify a traditional state legislative decision, but it does so by *compelling* the State to impose substantive tort liability where the State does not wish to do so. Therefore, under well-settled principles of federalism and the equally settled presumption against preemption, any conceivable ambiguity in § 9658 would only demonstrate the need to resolve this case in favor of Petitioner and against the preemption of statutes of repose. *See also infra* p. 50 (discussing legislative history demonstrating, without recourse to any presumption, that Congress did in

fact adopt § 9658 to minimize its intrusion on state prerogatives).

In short, the presumption against preemption makes this an easy case, even if (contrary to the statute's text) § 9658 were viewed as ambiguous.

B. Under The Avoidance Canon, Any Ambiguity In § 9658 Must Be Resolved Against Preempting Statutes of Repose

A second interpretive principle—the canon of constitutional avoidance—supplies an independent ground for resolving any ambiguity in § 9658 against preempting statutes of repose.

The canon of constitutional avoidance "allows courts to *avoid* the decision of constitutional questions" through statutory interpretation. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This Court has often applied avoidance principles by adopting clear statement rules. When one interpretation of a federal statute would "upset the usual constitutional balance of federal and state powers," then "[i]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal quotation marks omitted).

Here, § 9658 would raise serious constitutional doubts if it were construed to force states to impose substantive tort liability as a matter of state law. As noted above, statutes of repose—unlike statutes of limitations—demarcate the bounds of *substantive* tort liability under state law. *See Bolick*, 293 S.E.2d at 420 (holding that a particular North Carolina statute of repose was substantive); *id.* ("Other states have similarly construed statutes of repose to be substantive provisions and not merely procedural modi-

fications of a remedy." (collecting citations)). Thus, if § 9658 preempted statutes of repose, it would be akin to a federal law *compelling* state legislatures to enact tort causes of action in the first instance. Yet, under basic principles of federalism, the Federal Government generally has no Article I authority to compel state legislation or decree the content of state law, particularly with regard to areas of traditional state regulation such as tort law. *See* U.S. Const. art. I § 8, cl. 18; *New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)); *cf. Stewart v. Kahn*, 11 Wall. 493 (1871) (discussing congressional power over state-court actions in rebellious States pursuant to the War Power Clause). Thus, reading § 9658 to preempt statutes of limitations would raise serious questions regarding unconstitutional commandeering of state law.

To be sure, there is one difference between direct federal commandeering of state law and a statute that preempts state statutes of repose. While there is no practical way for a State to evade an order *to enact* legislation, a federal order *preempting* state statutes of repose could in theory be averted by state legislation entirely eliminating the underlying state-law causes of action. But that difference—the existence of a coerced choice—does not make federal preemption of statutes of repose any more constitutional. In *New York v. United States*, the Federal Government forced states to choose between unconstitutional options: either take title to certain radioactive waste, or enact the federally prescribed regulatory scheme.

New York, 505 U.S. at 174-76. Because each of those options entailed unconstitutional commandeering, the choice between them was likewise unconstitutional. *See id.* Here, the decision below would have § 9658 force States to *either* extend substantive tort liability to a greater extent than the State itself desired, *or* enact state legislation eliminating the relevant category of substantive tort liability altogether. Because the Federal Government lacks authority to commandeer states to make either of those choices, it likewise lacks authority to compel states to choose between them.

The constitutional problem with reading § 9658 to preempt statutes of repose has important consequences for political accountability. *See New York*, 505 U.S. at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). When the Federal Government uses its preemptive authority to negate state laws, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* But accountability is thwarted when the Federal Government twists state legislation toward federal ends. As this Court has explained, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169; *cf. Printz v. United States*, 521 U.S. 898, 930 (1997). If § 9658 preempted statutes of repose, individuals would be deemed liable as a matter of *state* tort law, not because the State or its people had au-

thorized that liability, but because liability had been covertly decreed by the *federal* legislation.

This case is thus different from many other situations involving federal legislation and preemption of state law. As already noted, the constitutional difficulties potentially connected to § 9658 do not arise when Congress uses its preemption authority to *negate* state substantive law. *See New York*, 505 U.S. at 168. Indeed, federal negation of state substantive law is the inevitable implication of the Supremacy Clause. *See* U.S. Const. art. VI. And because CERCLA does not create a private federal cause of action for the kinds of claims subject to § 9658, this Court's interpretation of § 9658 cannot implicate Congress's separate authority to legislate federal-law claims, or proper procedures for the resolution of those claims. *See New York*, 505 U.S. at 178; *Testa v. Katt*, 330 U.S. 386 (1947).

Finally, the constitutional problem in this case is even more severe than the one posed by federal laws that affect state-court procedural rules that can be asserted as defenses, such as statutes of limitations. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 464-65 (2004) (citing Congressional Authority to Require State Courts to Use Certain Procedures in Products Liability Cases, 13 Op. Off. Legal Counsel 372, 373-74 (1989)); The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary, 105th Cong., 1st Sess. (1997) (statement of Laurence H. Tribe, Harvard Law School) ("For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims . . . would raise serious questions under the Tenth Amendment and principles of federalism.").

Unlike the foregoing measures, a federal law that preempted state statutes of repose would blur the boundaries between state and federal law. As this Court has explained, the Federal Government would exceed its authority if it enacted a law "seeking to control or influence the manner in which States regulate private parties." *Reno v. Condon*, 528 U.S. 141, 150 (2000) (quoting *South Carolina v. Baker*, 485 U.S. 505 (1988) (alterations omitted)); *see New York*, 505 U.S. at 161. Of course, state courts must follow federal-law instructions, since that is the "sort of federal 'direction' of state judges [that] is mandated by the text of the Supremacy Clause." *Id.* at 178-79. But if § 9658 were read to preempt statutes of repose, it would actually dictate the substantive content of state tort law, and so would force the States to do federal work. Tort liability would have to be found—as a matter of *state* law—even where the State had decreed that no liability should exist.

This Court's practice of avoiding constitutional questions thus counsels in favor of Petitioner's reading, even if § 9658 were viewed as ambiguous.

III. THE DECISION BELOW RESTED ON LEGAL ERROR AND MUST BE REVERSED

The decision below committed several clear legal errors, both in finding § 9658 to be ambiguous and in resolving that supposed ambiguity in favor of preempting state statutes of repose.

A. The Decision Below Erred By Finding Ambiguity In § 9658

1. The decision below began on the right track. It started by acknowledging the fundamental distinction between statutes of limitations and statutes of repose. *See* Pet. App. 9a-10a (citing *Black's Law Dic-*

tionary 1546 (9th ed. 2009); *First United*, 882 F.2d at 866). It then correctly recognized that N.C. Gen. Stat § 1-52(16) is a statute of repose. *See* Pet. App. 10a. And the decision below also candidly acknowledged that the phrase "'statute of limitations' appears in the statute five times," while "[n]oticeably absent is the phrase 'statute of repose.'" *Id.* at 11a-12a. "Thus," the court conceded, "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations." *Id.* at 12a.

2. Nonetheless, the decision below ultimately found ambiguity: "we reckon § 9658's text capable of at least two interpretations, preventing it from being straightforwardly categorized as 'plain and unambiguous.'" Pet App. 13a. The Fourth Circuit then listed three reasons for its ambiguity finding. *See id.* at 12a-13a. None withstands scrutiny.

The "[f]irst" purported reason for ambiguity has to do with the location of the North Carolina statute of repose within the North Carolina statute books. Pet. App. 12a. As the Fourth Circuit noted, the North Carolina statute of repose is "located with the statutes of limitations periods in a section titled, 'Limitations, Other than Real Property.'" *Id.* (citing N.C. Gen. Stat. § 1-52). "As such," the Fourth Circuit concluded, the statute of repose is "a limitations period 'specified in the State statute of limitations or under common law.'" *Id.* (quoting § 9658(a)(1)). But even the decision below does not claim that North Carolina has attached a "statute of limitations" label to its statute of repose. In any event, North Carolina courts are clear—and every federal judge to review this case below has agreed—that this case involves a

statute of repose. *See* Pet. App. 10a, 19a, 38a, 44a; *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) (finding claims to be barred "by the statute of *repose* found in § 1-52(16)" (emphasis added)); *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same).

The Fourth Circuit's "[s]econd" supposed reason for ambiguity consists of a conclusory statement regarding the meaning of § 9658(b)(2). Pet. App. 12a. In its entirety, this second argument reads as follows: the North Carolina statute of repose "is (1) a 'period' (2) 'specified in a statute of limitations,' (3) 'during which a civil action . . . may be brought'; thus, it comports with the definition of 'applicable limitations period.'" *Id.* (quoting § 9658(b)(2)). This assertion is wrong in several respects. While N.C. Gen. Stat § 1-52(16) could be viewed as defining a "period," that period is specified in what the decision below itself recognized to be a statute of repose. Therefore, the period in question is *not* "specified in a statute of limitations." § 9658(b)(2).

In addition, the decision below erred by positing that a statute of repose defines a period "during which a civil action . . . may be brought." § 9658(b)(2). As explained above, *see supra* Section I.B, it simply is not true that "a civil action . . . may be brought" when a statute of repose begins to run. § 9658(b)(2). To bring a tort suit, the plaintiff must (at a minimum) have suffered an injury, but that typically does not occur when a statute of repose begins to run. Because the time to bring a civil action does not commence until the running of a statute of limitations, the statutory definitions—as well as the term

"commencement date"—do not make sense if read to encompass statutes of repose. Thus, the decision below erred by asserting—without any explanation—that its interpretation "comports with the definition of 'applicable limitations period.'" Pet. App. 12a (quoting § 9658(b)(2)).

"Finally," the decision below added a third reason for finding ambiguity in § 9658, but that point is equally misguided. Pet. App. 12a. According to the majority, the "commencement date" for North Carolina's statute of repose "is earlier than the federally required commencement date." Pet. App. 12a-13a (citing § 9658(a)(1)). Again, however, *see supra*, the term "commencement date" is an odd way to refer to the date on which a statute of repose begins to run, since that is not the date when a civil suit can or will "commence" or when "a civil action . . . may be brought." § 9658(b)(2). And because statutes of repose will *always* begin to run "earlier" than the federally required commencement date (which constitutes a permissive discovery rule), the only conceivable reason to compare the state "commencement date" with the "federally required commencement date" is to see whether the State has adopted a *statute of limitations* akin to, or even more permissive than, the federally required commencement date. And, unsurprisingly, § 9658 says just that, referring repeatedly to the "statute of limitations."

Apart from the individual errors in the reasoning of the decision below, it is noteworthy that none of the Fourth Circuit's reasons even attempts to explain why it would make sense, given § 9658's text, to preempt statutes of repose. Instead, the decision purported to find ambiguity by looking for isolated

words and snippets of language that could conceivably include statutes of repose. That is not how statutory interpretation is normally carried out. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2004 (2012) (explaining that plain meaning corresponds to the usual meaning of words, not conceivable meanings).

3. Remarkably, the decision below actually conceded that it "seem[ed] to be stretching to find ambiguity in the text." Pet. App. 13a. Having thus admitted that its three stated reasons for finding ambiguity were unpersuasive, the decision below appended two more to the end of its analysis—*after* it had already concluded that § 9658 was ambiguous. *See id.*

The first of these additional reasons is that "a historical analysis" contained in two footnotes of another judicial decision supposedly "reveals that both scholars and courts have often used the terms [statutes of limitations and statutes of repose] interchangeably." Pet. App. 13a (citing *McDonald*, 548 F.3d at 781 & n.3-4). But that is not so. As the dissenting opinion below correctly explained, *see* Pet. App. 24a (Thacker, J., dissenting), courts had historically viewed "statute of repose" as a catch-all phrase covering different types of time bars, including statutes of limitations. *See, e.g.*, *Kubrick*, 444 U.S. at 117 (referring to a statute of limitations as a kind of statute of repose); *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) (same); *see also Bolick*, 293 S.E.2d at 417 (noting that "the term 'statute of repose' has traditionally been used to encompass statutes of limitation"). But even if the phrase "statute of repose" could be interpreted to cover statutes of limitations,

that would not justify the Fourth Circuit's converse holding that the phrase "statute of limitations" could be interpreted to cover statutes of repose. After all, only the term "statute of limitations" appears in § 9658.

The remaining sources referenced in the decision below overwhelmingly *reinforce* the terminological distinction between statutes of limitations and statutes of repose. Again, the decision below primarily relies on cases collected by the Ninth Circuit in *McDonald* (*see* 548 F.3d at 781 n.3), but almost all of those materials draw a terminological distinction between statutes of limitations and statutes of repose. *See Chamberlain v. Schmutz Mfg. Co.*, 532 F. Supp. 588, 590 (D. Kan. 1982) ("Statutes of repose differ from statutes of limitation . . . ."); *Bauld v. J.A. Jones Constr. Co.*, 357 So.2d 401, 402 (Fla. 1978); *Tindol v. Boston Hous. Auth.*, 396 Mass. 515, 517 (1986); *James Ferrera*, 486 N.E.2d at 60-61; *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985); *see also City of Dover v. Int'l Tel. & Tel. Corp.*, 514 A.2d 1086, 1089 (Del. 1986) (drawing the distinction for modern purposes, but not when construing the meaning of the earlier-enacted state constitution); *Bolick*, 293 S.E.2d at 417; *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 612-13 (7th Cir. 1975) (Stevens, J.) ("[T]he absolute bar creates a true statute of repose after sufficient time has elapsed"). The other cited decisions simply adopt the older usage of "statute of repose" as an umbrella term. *McDonald* also purported to rely on a 1980 article, but that essay discussed historical uses of the relevant terms before explaining and largely *adopting* the now-standard usage. *See* McGovern, *supra*, 30 Am. U. L. Rev. at 581-87. Thus, the "analysis" referenced in the deci-

sion below only reconfirms that, by 1986, the phrase "statute of limitations" was understood to exclude statutes of repose.

The decision below offered one last reason, and it was perhaps the most baffling of all. According to the Fourth Circuit, § 9658(a)(1) "manifests a lack of internal consistency," because § 9658(a)(1) provides that the "applicable limitations period" is "specified in the State statute of limitations or under common law," whereas "the definition of 'applicable limitations period' and 'commencement date' make no reference to common law." Pet. App. 13a (quoting § 9658(a)(1), (b)(2)-(3)). Apart from the fact that there is no inconsistency in acknowledging common-law statutes of limitations in one part of § 9658 but not another, the decision below did not even attempt to explain how this purported inconsistency had *any* bearing on the question presented. *Even if* the decision below were correct that § 9658 were somehow ambiguous in the event of "a limitations period [that] is established only under common law," Pet. App. 13a, that alleged ambiguity would shed no light whatsoever on whether § 9658 should or should not preempt statutes of repose. In advancing this facially irrelevant argument, the Fourth Circuit appears to have been striving to buttress its earlier observation that "CERCLA is often criticized for its lack of precision." Pet. App. 3a. Once again, the decision below "seem[ed] to be"—in its own words—"stretching to find ambiguity in the text." *Id.* at 13a.

B. The Decision Below Erred By Construing § 9658 In Light Of CERCLA'S Supposed "Remedial" Purpose

Having erroneously found § 9658 to be ambiguous, the decision below compounded its error by improperly resolving the statute's supposed ambiguity based on the court's own perception of CERCLA's general purposes.

1. The decision below interpreted § 9658 to preempt statutes of repose because—in the court's view—doing so would further CERCLA's "remedial" purpose. Pet. App. 14a-15a. The Fourth Circuit's primary evidence that CERCLA exhibited this purpose came from a law review article pointedly entitled: *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far? See* Pet. App. 14a (citing Blake A. Watson, 20 Harv. Envtl. L. Rev. 199, 286 (1996)). As even that article noted, the remedial-purpose principle often leads courts to error, including in connection with "provisions of CERCLA that"—like § 9658—"are the product of compromise." *Id.* at 301; *see infra* pp. 50-51 (discussing Congress's choice to enact § 9658 instead of legislating a federal cause of action). The decision below also pointed to certain legislative history—even though that evidence, if reliable at all, purported to show only that *one* goal of § 9658 was to "address" (not even to adopt) some of the recommendation and points raised in the study group report. *See* Pet. App. 14a (citing H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354).

Having found this supposed "remedial purpose," the decision below said that it would "reject" a read-

ing of § 9658 that would leave statutes of repose intact, even though that interpretation "may seem to be textually sound under one possible reading of the statute." Pet. App. 15a. In the view of the decision below, that "textually sound" result was unappealing because it "offers too narrow an approach and one that thwarts Congress's unmistakable goal of removing barriers to relief from toxic wreckage." *Id.* at15a. This reasoning is flat wrong.

As this Court has repeatedly explained, "no law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality opinion)). Thus, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *see also In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987) (Easterbrook, J.) ("Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying 'values' or 'purposes' point (which has direction alone)."). The very idea of a "remedial" statute—a law that pursues compensatory objectives above all else—is therefore more theoretical than real.[1]

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[1] Historically, the "remedial-statute rule" was not an interpretive principle in its own right, but instead "was

In CERCLA itself, Congress clearly did *not* seek to remove all state procedural barriers to relief in hazardous waste cases. In fact, Congress specifically chose *not* to enact a new federal cause of action—a basic step normally associated with supposedly "remedial" legislation—based in part on concerns about excessive federal intrusion into state prerogatives. *See, e.g.*, 131 Cong. Rec. 35,647 (Dec. 10, 1985) (statement of Rep. Glickman) (specifically objecting to an amendment that would have created a federal cause of action because it "override[s] substantive standards of the States"). Thus, there is no need in this case to *presume* that Congress sought to minimize federal preemption of state law. *See supra* Section II.A. (discussing the presumption against preemption). Instead, the legislative history *demonstrates* that the Congress that enacted § 9658 sought to minimize its intrusion into a traditional state domain. When a federal law "strikes a balance" between competing interests, this Court will not "construe [the measure] 'liberally' to serve its ostensibly 'remedial' purpose." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008). That reluctance is especially warranted here, since it would blatantly defy a legislative compromise if § 9658 were read to "overrid[e] substantive standards of the States" by preempting statutes of repose. 131 Cong. Rec. 35,647 (statement of Rep. Glickman).

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just an antidote to the unreasonable rule that statutes in derogation of the common law were to be strictly construed." Hon. Antonin Scalia & Bryan A. Garner, *Reading Law* 365 (2012).

In crafting § 9658, Congress also balanced the interests of potential plaintiffs against the countervailing interests of potential defendants, who have an important and well-recognized stake in obtaining repose. This legislative balancing can be seen in the many plaintiff-friendly recommendations that were put forward by the study group but rejected by Congress. *See* Pet. App. 34a (citing Study Group Report 240-51). For example, the study group recommended adoption of modified evidentiary presumptions and liberal joinder rules—yet those proposals were not adopted. *See ibid.* So even if § 9658 were largely meant to benefit plaintiffs, "[i]t does not follow that this remedial purpose requires us to interpret every uncertainty in the Act in favor of" plaintiffs. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). On the contrary, "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Id.*

Here, § 9658 furthers Congress's remedial purposes insofar as it preempts statutes of limitations. But § 9658 simultaneously preserved statutes of repose and so respected the public's important interest in avoiding perpetual vulnerability to litigation for long-past actions. Of course, Congress also could have indiscriminately imposed CERCLA liability on any person who happens to occupy land adjacent to a CERCLA site. That would advance broad remedial purposes; but it is not the law. By allowing its own conception of statutory purpose to trump statutory text, the decision below implemented its own vision of good tort policy, in place of what Congress deliberately enacted. "Given the clear meaning of the text, there is no need . . . to consult the purpose of CERCLA at all." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004).

2. In any event, the analysis of the decision below fails even on its own terms. According to the majority, Congress enacted § 9658 "to 'address the problem identified in the study group report,'" and statutes of repose constitute "precisely the barrier that Congress intended § 9658 to address." Pet. App. 14a-15a (quoting H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354 (alterations and ellipsis omitted)). But that is demonstrably incorrect.

First, the "problem identified" in the study group report was a problem concerning statutes of limitations—namely, the failure of many States to adopt so-called "liberal discovery rules" that run from the date when the cause of injury is discovered. *See* Study Group Report 28. As the study group put it: "The plaintiff's ability to recover will often depend on whether a liberal discovery rule is applicable." *Id.*; *see also id.* ("[T]he question is . . . the time when the action accrues."). That "problem" has nothing to do with statutes of repose. Indeed, when specifically reviewing North Carolina law—including its ten-year statute of repose—the study group noted that the State had adopted a discovery rule and, as a result, its "statute of limitations will not bar a private cause of action arising from latent personal injuries." Study Group Report Appendix B-10.

Second, the study group's recommendation as to "Statutes of Limitations" was that the States should voluntarily adopt a more liberal discovery rule relating to the cause of the injury, as opposed to the traditional rule or a relatively stringent discovery rule pertaining to the discovery of injury. *See* Study Group Report 240-41 ("The Study Group recommends that all states that have not already done so, clearly

adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause."). Thus, § 9658 fully addressed the "problem identified" in the study group's report by legislating a liberal discovery rule—and without preempting statutes of repose.

Finally, the study group did *not* recommend that States categorically abolish statutes of repose, much less that the Federal Government preempt those laws. Instead, the study group recommended that States—on their own initiative—"repeal *the* statutes of repose which, *in a number of states* have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." *Id.* (emphases added). This language suggests that the study group recommended only that "a number of states" *voluntarily* repeal their statutes of repose. *Id.* That recommendation plainly does not equate to compulsory federal preemption of *all* state statutes of repose. Yet that is precisely the effect of the Fourth Circuit's strained reading: *every* state statute of repose—no matter how reasonable, no matter how minimally burdensome to plaintiffs—is preempted. On that rule, *every* potential CERCLA defendant nationwide must be eternally vulnerable to civil suit. Nothing in the study group—much less § 9658—contemplated that extreme result.

In sum, the decision below was simply wrong when it asserted that its "stance goes no further than that contemplated by the study group that Congress commissioned." Pet. App. 17a. Even if overarching statutory "purposes" should sometimes guide statutory interpretation, the decision below erred by imput-

ing such a simplistically one-sided "remedial" purpose to § 9658.

3. The openly legislative character of the decision below becomes most obvious at its conclusion. In a self-conscious effort to reassure all "entities that wish to rest in the security of statutes of repose"—which is to say, everyone—the decision below reviewed "the well-known policies underlying" statutes of repose and promised that "we are not ignorant of these policies, nor have we turned a blind eye to their importance." Pet. App. 16a. The analysis that follows is risible.

The decision below actually found it reassuring that, without statutes of repose, "necessary evidence will disappear as time passes, and intervening causes will complicate efforts to pin costs on one party." Pet. App. 17a. One would have thought that these points would counsel in favor of *preserving* statutes of repose. After all, the loss of "necessary" *defense* evidence could easily result in the imposition of unjustified, disproportionate, or misallocated liability. As this Court once put it when using the broad meaning of the phrase "statutes of repose":

> [S]tatutes of repose . . . *protect defendants* and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Kubrick, 444 U.S. at 117 (emphasis added) (collecting cases); *cf.* Pet. App. 17a (trivializing *Kubrick* as simply being concerned "that cases are processed efficiently"). In the view of the decision below, however, any

lost evidence meant only that "*plaintiffs* may not be able to establish a cause of action or recover damages." *Id.* (emphasis added) This reasoning ignores *Kubrick*'s insight that courts can wrongly impose liability on defendants based on a record clouded by the passage of time.

The decision below also saw fit to minimize the interest in finality advanced by statutes of repose. All that the Fourth Circuit says on this point is that "defendants will not *necessarily* be endlessly subjected to the possibility of litigation." *Id.* (emphasis added). The qualification drains that sentence of meaning. The whole point of repose is reassurance—to *know* that what is past is past.

C. The Decision Below Erred By Not Resolving Any Ambiguity Based On Interpretive Canons

Finally, even if § 9658 were ambiguous, and even if it had a uniformly "remedial" purpose, the decision below would *still* be wrong because it failed to resolve the statute's supposed ambiguity based on applicable interpretive canons—namely, the presumption against preemption and constitutional avoidance. As the decision below vividly illustrates, those settled canons offer a far more neutral and principled basis for resolving statutory questions than recourse to judicially constructed "remedial" purposes.

Here, as the dissenting opinion below observed, the "ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation." Pet. App. 35a (Thacker, J., dissenting); *see, e.g.*, *Raygor*, 534 U.S. at 544; *Hillsborough Cnty.*, 471 U.S. at 715. Therefore, § 9658 triggers the well-settled

presumption against preemption, and the Fourth Circuit should have construed any ambiguity to *avoid* preemption. *See Altria*, 555 U.S. at 77; *see supra* Section II.A. Alternatively, § 9658 should be construed in light of the canon of constitutional avoidance. *See supra* Section II.B.

But the majority did not follow any recognized canon of interpretation. Instead, it relied on CERCLA's supposedly remedial purpose to interpret all ambiguities in *favor* of preemption. When doing so, moreover, the Fourth Circuit did not even mention the presumption against preemption or offer an explanation of why that presumption somehow does not apply here. Pet. App. 7a-16a. By flipping settled interpretive principles on their head, the decision below contradicted this Court's precedents. It should not be allowed to stand.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether 42 U.S.C. § 9658 preempts the ten-year period of repose in N.C. Gen. Stat. § 1-52.

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INTRODUCTION

Congress passed CERCLA to ensure that parties responsible for releasing hazardous wastes into the environment from a facility would bear the costs of cleaning up the environment. To further this goal, section 9658 of CERCLA replaces the commencement date of state limitations periods that begin before plaintiffs "knew (or reasonably should have known)" of their property damage with a "federally required commencement date" that begins when plaintiffs "knew (or reasonably should have known)" of their property damage. The question here is whether the "federally required commencement date" affects all state limitations periods that begin before plaintiffs knew or should have known of their harm, including absolute repose periods. As demonstrated by both the plain language and legislative purpose of section 9658, the answer is yes.

STATUTORY PROVISIONS INVOLVED

Section 9658 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9658, provides, in pertinent part:

Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

> (1) Exception to State statutes — In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for

such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable — Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

. . .

(b) Definitions — As used in this section—

. . .

(2) Applicable limitations period — The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date — The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general — Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have

> known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

North Carolina General Statutes, § 1-46, "Periods prescribed," provides:

> The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article.

North Carolina General Statutes, § 1-52, "Three years," provides, in pertinent part:

> Within three years an action –
>
> . . .
>
> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
>
> . . .
>
> (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

STATEMENT

A. The terms "statutes of limitation" and "statutes of repose"

Traditionally, statutes of limitation began to run from the wrongful act or omission complained of, without regard to when the harmful consequences were discovered. *See, e.g., Shearin v. Lloyd*, 98 S.E.2d 508, 512 (N.C. 1957). As a result of the harsh results possible from such a rule, jurisdictions began to adopt versions of the "discovery rule" by which statutes of limitation did not begin to run until a plaintiff had discovered the harm. *See, e.g., Ballenger v. Crowell*, 247 S.E.2d 287, 293 (N.C. Ct. App. 1978). In response to the discovery rules, some jurisdictions also placed absolute time limits in their statutes of limitation on when actions may be brought. *See Hinkle v. Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) ("probably all statutes of repose . . . are surgical strikes by the legislature against the discovery rule").

When section 9658 was enacted in the 1980s, courts often used the term "statute of repose" to refer to such a "*portion of a statute of limitation* that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action." Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 583 (1981) (emphasis added). Such portions of statutes of limitation are "more precisely referred to as a period of repose." *See Black v. Littlejohn*, 325 S.E.2d 469, 474 (N.C. 1985).

Through the 1980s, this Court used the term "statute of limitations" to refer to periods of repose. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v.*

Gilbertson, 501 U.S. 350, 362 n.8 (1991) (referring to three-year repose period as "a portion of an express statute of limitations"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976) (referring to "statute of limitations" with discovery provision and three-year absolute repose provision); *see also Harding v. K. C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992) (stating "the United States Supreme Court makes no distinction between statutes of limitations and statutes of repose").

Congress has never used the term "statute of repose" or "repose" when referring to a period of repose that caps the time within which an action may be brought. To this day, Congress places such provisions within "statutes of limitations" or other headings using the term "limitation." *See, e.g.*, 15 U.S.C. § 78u-6(b)(iii)(1)(aa) (creating repose provision under heading "Statute of limitations"); 18 U.S.C. § 1514A(b)(2)(D) (same); 42 U.S.C. § 2278 (same); 49 U.S.C. § 20109(d)(2)(ii) (same). *See also In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1063 n.5 (C.D. Cal. 2012) ("Congressional statutes continue to use the term 'statute of limitation' to encompass statutes of repose.").

B. CERCLA section 9658

In 1980, Congress enacted CERCLA in response "to serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA was meant to ensure that those "actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions.'" *Id.* at 55-56 (quoting S. Rep. No. 96-848, at 13 (1980)).

Congress also established a twelve-member study group to review "the adequacy of existing common law and statutory remedies." 42 U.S.C. § 9651(e). The study group had three members each from four different legal associations: the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General. *Id.* § 9651(e)(2). The study group's members included a retired Chief Judge of the New York Court of Appeals, two sitting and one former State Attorneys General, three law professors, and several attorneys in private practice. *See* Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies; A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group" at unnumbered inner page (1982) (hereafter "Study Group Report"). Congress directed the study group to evaluate "barriers to recovery posed by existing statutes of limitations" and "explicitly address the need for revisions in existing statutory or common law." 42 U.S.C. §§ 9651(e)(3)(F), (e)(4)(A).

The study group submitted its report to Congress in July 1982. The Study Group Report repeatedly noted that injuries from hazardous wastes have long latency periods. Study Group Report at Reporter's Introduction ("extended latency periods"), 8 ("15 to 20 years"), 16 ("long latency periods"), 17 ("latent injuries"), 28 ("long latency periods, sometimes 20 years or longer"), 31 ("long latency periods"), 55 ("ten-to-forty year latency period"), 116 ("personal injuries are often latent for many years"), 240 ("thirty years or more"), 242 ("effects may not manifest themselves

until 20 or 30 years later"), 244 ("long latency periods"), 245 ("long latency periods"), A-3 ("15 to 20 year latency period"), B-1 ("The injuries caused by hazardous waste disposal are often latent, or delayed in manifesting themselves."), L-17 (adverse health effects, including cancer, "may not appear until twenty to forty years after exposure"), L-20 ("latency periods of 20 to 30 years or more").

Due to these long latency periods, the Study Group Report concluded that "[c]ommencement of the running of the statute of limitations can be a barrier to recovery." *Id.* at 28. A rule that statutes of limitation begin to run when a plaintiff is exposed to hazardous substances, rather than from discovery of harm, "will defeat most actions before the plaintiff knows of his injury." *Id.* The study group determined that the barrier to recovery posed by limitations periods could be reduced if states adopted a discovery rule. *Id.* at 117. Accordingly, under the heading "Statutes of Limitation," the Study Group Report recommended "that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the disease and its cause." *Id.* at 241. The Report specified that "[t]he Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claims before he knows that he has one." *Id.*

The Study Group Report also contained a "State-by-State analysis" of existing "statutes of limitation" in all 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico. *Id.* at Appendix B-6. In that analysis, entitled "Statutes of Limitation applicable to

actions arising out of hazardous waste disposal," the study group consistently used the term "statute of limitation," whether referring to the period in which a claim can be brought as measured from accrual or from the occurrence of the event that caused the injury. *See id.* at B-6 to -10 (describing parts of Connecticut, Kansas, and North Carolina statutes).

The study group criticized absolute repose provisions. As to Connecticut's statute of limitations, for example, which includes the repose provision that "no such action may be brought more than three years from the date of the act or omission complained of," the study group stated:

> The present law is not, however, completely favorable to victims of toxic waste induced personal injuries. In many such cases, the plaintiff will not have sustained, nor would the prudent person have discovered his injury within three years after the culpable act.

Id. at B-7. Similarly, as to a repose provision in the Kansas statute of limitations, the study group stated:

> The statute would not protect a plaintiff with a particularly slowly developing injury, because it provides that "in no event shall the period be extended for more than ten years beyond the time of act giving rise to the cause of action."

Id. at B-8.

Although six of the twelve study group members submitted separate comments disagreeing with certain aspects of the Study Group Report, not one disagreed with the need for a liberal discovery rule. *See id.*, Part 1, Comments. Indeed, the Report stated:

> There has been general agreement that the discovery rule should apply to claims for injuries growing out of exposure to hazardous wastes because of long latency periods common for such injuries. Thus, the statute of limitations for such a claim should begin to run only when the injured party knows, or should know in the exercise of reasonable discretion, that he has suffered an injury.

Id. at L-1.

In response to the Study Group Report, in 1986 Congress amended CERCLA by enacting 42 U.S.C. § 9658, entitled, "Exception to State statutes." Subsection (a) contains an express preemption clause, which may apply to "any action . . . under State law for personal injury, or property damages . . . caused or contributed to or by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility." 42 U.S.C. § 9658(a)(1). In such actions, if the "applicable limitations period . . . provides a commencement date . . . earlier than the federally required commencement date, [then] such period shall commence at the federally required commencement date." *Id.*

Congress defined "applicable limitations period" as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." 42 U.S.C. § 9658(b)(2). "Commencement date" is defined as "the date specified in a statute of limitations as the beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). The "federally required commencement date" is a discovery rule defined as "the date the plaintiff knew (or reasonably should have known) that the personal in-

jury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4).

Combining these definitions, the federally required commencement date applies in any action when the period in a state statute of limitations in which the action may be brought begins before the plaintiff knew or should have known that his injury was caused or contributed to by a hazardous substance covered by CERCLA.

The accompanying House Conference Report stated that section 9658 "provides for a Federal commencement date for State statutes of limitations which are applicable to harm which results from exposure to a hazardous substance." H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. Echoing the Study Group Report's concerns and language, the House Conference Report stated that:

> In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party "discovers" that his injury was caused by the hazardous substance or pollutant or contaminant concerned.
>
> The study done pursuant to Section 301(e) of CERCLA by a distinguished panel of lawyers noted that certain State statutes deprive plaintiffs of their day in court. The study noted that the problem centers around when the statute of limitations begins to run rather than the number of years it runs.

> This section addresses the problem identified in the 301(e) study. . . . [A] Federally-required commencement date for the running of State statutes of limitations is established.

Id.

C. North Carolina's limitations statute

Article 5 of the North Carolina General Statutes, entitled "Periods Prescribed," sets forth "[t]he periods prescribed for the commencement of actions, other than for the recovery of real property." N.C. Gen. Stat. § 1-46. Section § 1-52, entitled "Three Years," states a three-year statute of limitations for breach of contract, torts, and certain other causes of action. *See Adams v. Nelson*, 329 S.E.2d 322, 325 (N.C. 1985) (noting Court of Appeals applied "G.S. 1-52, the statute of limitations for breach of contract actions"); *Danielson v. Cummings*, 265 S.E.2d 161, 162 (N.C. 1980) (defendants asserted "the action was barred by the three-year statute of limitations, G.S. 1-52"). Subsection 16 of section 1-52 sets forth a discovery rule that causes of action for personal injury or property damage do not accrue until bodily harm or physical property damage becomes apparent or reasonably ought to have become apparent, "Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Subsection 16 thus fixes a ten-year period in which causes of action for bodily harm or physical property damage "may be brought." *Hodge v. Harkey*, 631 S.E.2d 143, 145 (N.C. Ct. App. 2006). The ten-year period begins to run at the last act or omission of the defendant, not at the discovery of harm. *Id.* at 146.

While lower courts have referred to provisions such as subsection 16 as a "statute" of repose, "[t]his outer limit is more precisely referred to as a *period* of repose." *See Black*, 325 S.E.2d at 474 (emphasis added); *see also Doe v. Doe*, 973 F.2d 237 (4th Cir. 1992) (repeatedly referring to the second sentence in subsection 1-52(16) as a "10-year period of repose").

D. Proceedings below

Petitioner CTS Corporation (CTS) is a successor to CTS of Asheville, Inc., which manufactured electronic parts at the Mills Gap Road Electroplating Facility, in the Skyland community of Buncombe County, North Carolina. Pet. App. 51a-52a; Fourth Cir. Jt. Appx. 21. The corporation used various toxic solvents, including trichloroethylene (TCE), cyanide, chromium VI, and lead. Pet. App. 51a. CTS operated the facility until November 1985. Pet. App. 53a. In 1986 or 1987, CTS placed the facility and surrounding land for sale, representing that the site "has been rendered in an environmentally clean condition." *Id.* In December 1987, CTS sold 54 acres of the industrial site to a general partnership and provided specific warranties that the property was free of environmental contamination. *Id.* 53a-54a.

Respondents are individuals who live on or near the property formerly owned by CTS and who have been and continue to be exposed to toxins left behind by Respondents via contact from water, air, and land. *Id.* 54a, 56a. On November 23, 2009, the United States Environmental Protection Agency (EPA) advised Respondents David Bradley and Renee Richardson that their well water contained startlingly high levels of TCE and was not fit for human consumption. *Id.* 55a-56a. TCE is a manmade solvent that is persis-

tent, highly mobile, and carcinogenic. *See, e.g.*, Fourth Cir. Jt. Appx. 174; Environmental Protection Agency, EPA/635/ R-09/011F, Toxicological Review of Trichloroethylene 1-1, 4-635 to 4-637 (2011). The EPA has concluded that the groundwater contamination is at least partially due to CTS. Fourth Cir. Jt. Appx. 174. Although the EPA and CTS entered into an "Administrative Order on Consent for Removal Action" in late 2003 to early 2004, *id.* 190-221, there has never been a removal action or a remediation of the site.

On February 22, 2011, less than two years after the EPA notification, Respondents sued CTS for nuisance in the United States District Court for the Western District of North Carolina, invoking the court's diversity jurisdiction. Pet. App. 48a. CTS moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that N.C. Gen. Stat. § 1-52(16) barred Respondents' complaint. Fourth Cir. Jt. Appx. 37, 41-42. In response, Respondents contended that their action was timely, based in part on 42 U.S.C. § 9658. *Id.* 118-19, 258-62.

Finding that the last act or omission of CTS occurred in 1987, Pet. App. 44a, the magistrate judge recommended that the action be dismissed, reasoning that section 9658 preempts only the "state accrual date in environmental cases," *id.* 46a, and also that statutes of limitation and statutes of repose are two distinct types of statutes, one procedural and one substantive. *Id.* 47a. The district court then granted CTS's motion to dismiss, in a short opinion concluding that the plain language of section 9658 applies only to state "statutes of limitations, not statutes of repose." *Id.* 37a-38a.

The Fourth Circuit reversed, holding that the discovery rule articulated in section 9658 preempts North Carolina's ten-year limitation. *Id.* 2a. With one judge dissenting, the court stated that section 9658 could be read to apply only to statutes of limitation because it does not use the term "statutes of repose," *id.* 12a; however, applying the plain language of subsection 9658(a)(1) and the definitions in subsection 9658(b), section 9658 can also be read to preempt the ten-year limitation provision in N.C. Gen. Stat. § 1-52(16). *Id.* 12a-13a. The court noted that the use and meaning of the terms "statute of limitations" and "statute of repose" had developed considerably over the years and that historically the terms had often been used interchangeably. *Id.* 13a.

Because the text of section 9658 could be read as either including or excluding "statutes of repose," the court of appeals then looked to other indicia of congressional intent. *Id.* 14a. The court noted that Congress adopted section 9658 to address the problem identified in the Study Group Report, which was "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them." *Id.* The court also noted that CERCLA is remedial, that section 9658 resulted from Congress's specific concern with ensuring adequate remedies, and that section 9658 furthers the Act's remedial goals by preempting state limitations periods that would bar causes of action for latent harms. *Id.* 14a-16a. The court concluded that interpreting section 9658 to exclude North Carolina's ten-year statute of repose would "obliterate legitimate causes of action before they exist. . . . precisely the barrier that Congress intended § 9658 to address." *Id.* 15a. Such a reading would thwart Congress's goal of

removing barriers to relief from hazardous substances. *Id.*

SUMMARY OF ARGUMENT

I. The plain wording of section 9658 expressly preempts the North Carolina repose provision. Section 9658 preempts an "applicable limitations period" that provides an earlier "commencement date" than the "federally required commencement date." The repose provision meets the definition of "applicable limitations period" because it provides "the period specified in a statute of limitations during which a civil action . . . may be brought." Generally speaking and under North Carolina law, repose provisions define the period within which an action may be brought. The repose provision is also specified within a statute of limitations. The repose provision's "commencement date," defined as the "beginning" of the period, is when the defendant last acted or failed to act. That commencement date is earlier than the "federally required commencement date," defined as when the plaintiff knew or should have known that the property damage was caused or contributed to by the hazardous substance.

The structure of section 9658(a) supports this conclusion. State limitations periods that have an earlier commencement date are preempted under paragraph (1), while those that do not continue to apply under paragraph (2). Congress's approach demonstrates that it did not carve out repose provisions and leave plaintiffs in some states with a less favorable commencement date.

II. Section 9658 also impliedly preempts the North Carolina repose provision. Congress enacted section 9658 to prevent plaintiffs injured by exposure to haz-

ardous substances released into the environment from a facility from being deprived of their day in court by state statutes that run before the plaintiffs discover the cause of their latent harm. That purpose can be frustrated by either a limitations period without a discovery rule or by a repose period. Both can have the effect of barring plaintiffs' claims before they know they have them, as the study group noted. The study group repeatedly expressed concern about the problem of latent harm from hazardous substances and the importance of a discovery rule, and in enacting section 9658, Congress agreed that individuals with latent harm should not be deprived of relief by limitations periods that begin before discovery.

A uniform trigger date for all state limitations periods would apply equally where environmental contamination crosses state lines and eliminate the incentive for states to pass more restrictive limitations periods to compete for hazardous waste producers. The remedial statutes rule supports reading section 9658 to reach repose provisions, and all the circuits but one have applied that rule in construing CERCLA. Section 9658 is the epitome of a remedial statute, because Congress directed the study group to evaluate barriers to recovery and address the need for revisions in statutory and common law, and then acted on the study group's identification of statutes of limitation that begin to run before latent harm is discovered as the primary barrier to recovery. CTS and the government misread the legislative history and the legislative compromise underlying section 9658, which fully support preemption of all limitations periods with a commencement date earlier than the federally required commencement date.

III. CTS's remaining arguments are unpersuasive. The presumption against preemption does not apply here. The avoidance canon was not raised or reached below, and there is, in any event, no serious concern as to section 9658's constitutionality. Recognizing preemption in this case will affect only claims involving the release of hazardous substances into the environment from a facility. It appears that no state has enacted a "statute of repose" specific to such claims, and that only five states have catch-all repose periods that could apply to such claims. Finally, the government's argument that CERCLA's remedial aim does not extend to tort actions goes against the statute's plain wording and legislative history, and is contradicted by the government's position in a prior similar case.

ARGUMENT

I. SECTION 9658 EXPRESSLY PREEMPTS NORTH CAROLINA'S REPOSE PROVISION.

A. The text of section 9658(a)(1), entitled "Exception to State statutes," provides the best evidence of its preemptive scope. *See, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2013). Section 9658(a)(1) displaces an "applicable limitations period" that provides an earlier "commencement date" than the "federally required commencement date," as CERCLA defines those three terms. *See supra* p.2. *See also Burgess v. United States*, 553 U.S. 124, 129-30 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Applying CERCLA's defini-

tions, section 9658 preempts the North Carolina repose provision.

First, CERCLA defines the "applicable limitations period" as "the period specified in a statute of limitations during which a civil action . . . may be brought." 42 U.S.C. § 9658(b)(2). Repose provisions by their very nature define the period when an action "may be brought." 54 C.J.S. *Limitations of Action* § 4, at 20-21 (1987) ("statute of repose . . . limits the time within which an action *may be brought*") (emphasis added). More specifically, here, the North Carolina repose provision establishes a ten-year period in which an action for property damages may be "brought." *See, e.g., Boudreau v. Baughman*, 368 S.E.2d 849, 857 (N.C. 1988) ("If the action is not *brought* within *the specified period*," a plaintiff has no cause of action) (emphases added); *Bernick v. Jurden*, 293 S.E.2d 405, 413 (N.C. 1982) ("a statute of repose . . . places a cap or outer limit on *the time period* within which a products liability action *may be brought*") (emphases added); *Hodge*, 631 S.E.2d at 145 ("The plain language of the statute indicates that in cases involving property damage, no cause of action *may be brought* more than ten years after the defendant's last act or omission.") (emphasis added). Furthermore, the North Carolina repose provision is a "period specified in a statute of limitations;" in fact, it is a subsection of a statute of limitations provision, N.C. Gen. Stat. § 1-52. Section 1-52 is located in Chapter 1 ("Civil Procedure"), Subchapter 2 ("Limitations"), and Article 5 ("Limitations, Other Than [Recovery of] Real Property") of the North Carolina General Statutes.

Second, CERCLA defines "commencement date" as "the date specified in a statute of limitations as the

beginning of the applicable limitations period." 42 U.S.C. § 9658(b)(3). (emphasis added). Repose provisions fit smoothly into this definition, as they have a "beginning" tied to a specific event. *See, e.g.*, 54 C.J.S. *Limitations of Action*, § 4, at 20-21 ("the period contained in a statute of repose *begins* when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted") (emphasis added). Here, the "beginning" of the repose period is "the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). Indeed, states with similar repose provisions expressly tie the term "commence" to the defendant's act. *See* Kan. Stat. Ann. § 60-513 ("in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action"); Or. Rev. Stat. § 12.115(1) ("In no event shall any action . . . be commenced more than 10 years from the date of the act or omission complained of.").

CTS argues that repose provisions do not have a "commencement date" because "it simply is not true that 'a civil action . . . may be brought' when a statute of repose begins to run." Pet. Br. 23; *see also* Pet. Br. 24, 43. CTS's mistake, however, is in confusing language from the definition of "applicable limitations period," with the definition of "commencement date." The phrase "a civil action . . . may be brought" is from the definition of "applicable limitations period," not from the definition of "commencement date." *See* 42 U.S.C. §§ 9658(b)(2)-(3). Thus, CTS's argument that the definition of "commencement date" "would not make sense" (Pet. Br. 23) as applied to a repose period fails because the argument is not in fact based on the definition of "commencement date." In addition, CTS excerpts the language "a civil action . . . may be

brought" from the "applicable limitations period" definition, which, as explained above, read in full comfortably applies to repose provisions. *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.").

Third, CERCLA defines the "federally required commencement date" as "the date the plaintiff knew (or reasonably should have known) that the property damages . . . were caused or contributed to by the hazardous substance." 42 U.S.C. § 9658(b)(4)(A). The North Carolina "commencement date" of 1987 is earlier than this "federally required commencement date" of 2009.

The plain language of section 9658, which includes specific definitions of the preemptive scope of subsection (a)(1), covers the North Carolina repose provision in this case. Because the state commencement date under the applicable limitations period is earlier than the federally required commencement date, the federally required commencement date applies here. *See also Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 278 (D. Conn. 2003) (the federally required commencement date of section 9658 would clearly preempt Conn. Gen. Stat. §§ 52-577 and 52-584 because their limitations periods begin to run from the date of the act or omission).

B. The structure of section 9658 further shows that section 9658(a)(1) preempts the North Carolina repose provision. *See CSX Transp.*, 507 U.S. at 664 ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue.").

Section 9658(a) applies broadly to "any action brought under State law for personal injury, or prop-

erty damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment." Paragraphs (a)(1) and (a)(2) together address two possibilities as to a "commencement date." First, paragraph (a)(1) applies to "any action" in which the state "limitations period" would provide a "commencement date" that is "earlier than the federally required commencement date." In those cases, the federally required commencement date applies. Second, paragraph (a)(2), which applies to all cases "[e]xcept as provided in paragraph [a](1)," provides that the state "statute of limitations" applies. That is, section 9658(a) comprehensively addresses all state limitations periods, both those with commencement dates earlier than the federally required commencement date (paragraph 1), and those that do not have an earlier commencement date (paragraph 2). The statute is thus crafted to give plaintiffs the benefit of whichever limitations period is better for them. Paragraphs 1 and 2 together suggest that Congress intended comprehensively to address the applicable period during which a claim could be brought. CTS's reading, which would create a third, unaddressed category, would leave injured landowners in a few states (those with applicable repose provisions) in a worse position than those in the others. Paragraphs 1 and 2 together strongly suggest that Congress did not intend this carve out.

Looking beyond the statutory text, the government speculates that Congress may have excluded repose periods from section 9658 because a "statute of repose" is a "substantive" "condition precedent" under North Carolina law. U.S. Br. 27. Yet the government acknowledges that the substantive condition

precedent is "a time period in which suit must be brought." *Id.* (quoting *Boudreau*, 368 S.E.2d at 857). That language parallels the definition of "applicable limitations period" in section 9658, and this parallel supports the plain language reading that section 9658(a) encompasses repose provisions. *See* 42 U.S.C. § 9658(b)(2).

Additionally, even where state-law limitations periods are treated as substantive law, they are subject to preemption by federal law. *See, e.g., Jinks v. Richland Cnty.*, 538 U.S. 456, 464-65 (2003) ("Assuming for the sake of argument that a principled dichotomy can be drawn . . . between federal laws that regulate state-court 'procedure' and laws that change the 'substance' of state-law rights of action, we do not think that state-law limitations periods fall into the category of 'procedure' immune from congressional regulation."); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 316 n.7 (S.D.N.Y. 2012) (relying on *Jinks* to reject the argument that a federal statute could not "displace state statutes of repose" because they are substantive); *aff'd*, 712 F.3d 136 (2d Cir. 2013); Reply Br. of United States, *Jinks v. Richland Cnty.*, No. 02-258, 2003 WL 547429, at *7 (U.S. Feb. 21, 2003) (contending that Congress may preempt state limitations periods that are inconsistent with valid federal enactments and policies). Thus, the characterization of a repose provision as substantive law should not affect the outcome here. *See also Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648, 657 (N.C. 1992) ("despite the fact that statutes of repose differ in some respects from statutes of limitations, they are still time limitations"); *Boudreau*, 368 S.E.2d at 862 (Webb, J., dissenting) ("Whatever differences we may find in statutes of lim-

itation and statutes of repose, the purpose of both of them is to bar claims which are not filed within certain times. The majority has not said why there should be a different treatment of them because we call one statute substantive and the other procedural. I do not see why we should.").

C. CTS's arguments based on the text of section 9658 are unavailing. *First*, CTS highlights that section 9658 does not use the terms "statute of repose" or "repose." Pet. Br. 20, 25. But because the definitions in subsection 9658(a) encompass repose provisions, including the word "repose" was unnecessary. Furthermore, there is no textual support for CTS's argument that Congress—despite never having used the term "statutes of repose" in any statute—recognized a dichotomy between "statutes of limitation" and "statutes of repose" and in CERCLA intended to include one and not the other. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 746 (1996) (rejecting petitioner's dichotomy between "interest" and "penalty" where statute used only "interest").

In addition, although Congress has enacted provisions of absolute repose numerous times, it has never used the terms "statute of repose" or "repose" to do so. Congress has instead used "statute of limitations" or other phrases including "limitations" when enacting repose provisions. *See, e.g.*, 15 U.S.C. § 78u-6(b)(iii)(1)(aa) (creating repose provision under heading "Statute of limitations"); 18 U.S.C. § 1514A(b)(2)(D) (same); 42 U.S.C. § 2278 (same); 49 U.S.C. § 20109(d)(2)(ii) (same). Similarly, although there is no dispute that the North Carolina statute establishes a period of repose, it does not use the term

"repose." *See* N.C. Gen. Stat. § 1-52. Nor do the few other state statutes of limitations with general repose provisions that might apply to tort claims based on releases of hazardous substances. *See* Conn. Gen. Stat. § 52-584 (repose provision contained in chapter entitled "Statute of Limitations" and not using term "repose"); Kan. Stat. Ann. § 60-513(b) (repose provision contained in article entitled "Limitation of Actions" and not using term "repose"); Or. Rev. Stat. § 12.115 (repose provision contained in chapter entitled "Limitation of Actions and Suits" and not using term "repose"). Because "the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo," *Landis v. Physicians Ins. Co. of Wis.*, 628 N.W.2d 893, 907 (Wis. 2001), Congress's choice to use "limitations," and not "repose," is unremarkable and consistent with an intent to preempt repose periods such as North Carolina's, as applied to claims concerning injury from hazardous waste.

Second, CTS argues that section 9658 establishes an "accrual" provision, Pet. Br. 26, and the government similarly argues that the section alters only "accrual." *See* U.S. Br. 24. Traditionally, however, "accrual" referred to the starting point for all limitations periods. *See, e.g.*, *Black's Law Dictionary* 835 (5th ed. 1979). Moreover, as discussed above, section 9658 does not use the term "accrual;" it uses the term "commencement date," defined as the "beginning" of the applicable limitations period.

Third, CTS's argument that section 9658 preempts only "one state-law time period," Pet. Br. 24-25, begs the question. The dispute here is how to define that time period. Although CTS would have it otherwise, the repose period is plainly part of the

"state-law time period" in which claims can be brought under North Carolina law. Moreover, the substitution that CERCLA effects is a substitution of the "commencement date," not of a time period. Again, the North Carolina repose provision commences with "the last act or omission of the defendant," which is "a commencement date" that is earlier than "the federally required commencement date" set forth in section 9658(b)(4). Accordingly, CTS's focus on the singular "time period" argument does not help to elucidate the meaning of section 9658. *See also* 1 U.S.C. § 1 (in statutes, the singular includes the plural).

Fourth, although CTS suggests otherwise (Pet. Br. 28-29), contemporaneous dictionaries show that, in 1986, "statute of limitations" did not have a narrower meaning that excluded "statutes of repose." Rather, the dictionaries show that "statute of limitations" had a broad definition that encompassed "statute of repose," which was not yet separately defined. The then-current edition of *Black's Law Dictionary*, for example, under the entry "Limitations," defined "statute of limitations" as:

> Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. .... Also sometimes referred to as "statutes of repose."

Black's (1979), *supra, at* 835. *See also Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) (consulting "[t]he then-current edition of *Black's Law Dictionary*"). Further, not only did *Black's* definition twice conflate the two terms, *Black's* contained no separate definition for "statute of repose." Rather,

under "Repose statutes," *Black's* simply stated: "See Limitation (Statute of limitation)." *Black's*, *supra*, at 1169. Notably, in drafting section 9658, Congress used similar wording as *Black's* when it defined "applicable limitations period," suggesting that Congress likewise made no distinction between "statutes of limitation" and "statutes of repose." *Compare id.* at 835, *with* 42 U.S.C. § 9658(b)(2) (defining "applicable limitations period" as the "period [during which actions] "may be brought").

Other contemporaneous dictionaries also defined "statute of limitations" to include all limitations periods and contained no separate definition for "repose" or "statute of repose." *See* Irving Shapiro, *The New Dictionary of Legal Terms* 216 (1984) (defining "statute of limitations" as "[l]egislative enactment limiting time within which specified action or prosecutions must be instituted" and containing no definition of repose); Steven H. Gifis, *Dictionary of Legal Terms* 412 (1983) (defining "statute of limitations" as "*any* law that fixes the time within which parties must take judicial action to enforce rights or else be thereafter barred from enforcing them" and containing no definition of repose) (emphasis added); Daniel Oran, *Oran's Dictionary of the Law* 250-51, 403 (1983) (defining "Limitation" with a cross-reference to that definition under "Statute of limitations" and containing no definition of repose); George Gordon Coughlin, *Dictionary of Law* 163 (1982) (defining "statute of limitations" as "[l]imits fixed by statutes as to the time within which lawsuits may be started" and containing no definition of repose). In contrast to these five dictionaries, CTS argues that one dictionary "distinguish[ed] statutes of limitation and statutes of repose." Pet. Br. 28. That dictionary, however, defined

"statute of repose" by noting that a "statute of repose" is "sometimes called hybrid *statute of limitations*." Wesley Gilmer, Jr., *The Law Dictionary* 309 (1986) (emphasis added).

Fifth, CTS has it backwards when arguing that "statute of repose" was historically an umbrella term encompassing statutes of limitation. Pet. Br. 18, 29, 45-47. This Court, for example, has used the term "statute of limitations" to describe repose provisions. *See, e.g.*, *Merck & Co. v. Reynolds*, 559 U.S. 663 (2010) (describing unqualified ban on securities claims five years after violation as part of "[t]he applicable statute of limitations"); *Lampf*, 501 U.S. at 362 n.8 (referring to three-year repose period as "a portion of an express statute of limitations"); *Ernst & Ernst*, 425 U.S. at 210 (referring to "statute of limitations" with discovery provision and three year absolute repose provision).

Many other courts have concluded specifically that statute of limitations is the broader term for limitations periods, with "statute of repose" a subcategory. *See Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) ("The majority of the case law treats repose periods as a subcategory of statute of limitations."), *petition for cert. filed*, U.S. Nov. 8, 2013 (No. 13-576); *Fed. Hous. Fin. Agency v. UBS Americas*, 712 F.3d 136, 143 (2d Cir. 2013) ("the courts—including the Supreme Court and this Court—have long used the term 'statute of limitations' to refer to statutes of repose"); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 190 (Fla. Dist. Ct. App. 1991) ("a statute of repose is a form of a statute of limitations"); *Witherspoon v. Sides Constr. Co.*, 362 N.W.2d 35, 41 (Neb. 1985) ("A

statute of repose is a type of a statute of limitations."). As CTS and the government acknowledge, a "statute of repose" is "[u]nlike an *ordinary statute of limitations*" (Pet. Br. 29 (emphasis added); U.S. Br. 27), further showing that "statute of repose" is a subset of the broader category of statutes of limitations. *See Nat'l Credit Union Admin. Bd.*, 727 F.3d at 1266.

The West "Key Number System" similarly reveals that "statute of limitations" is the umbrella term. Begun more than a century ago by the founder of West Publishing, the West "Key Number System" organizes the law into various topics—one could say umbrellas. Topic number 241 is "Limitation of Actions." Within the topic "Limitations of Actions" are five main subtopics. The first of the main subtopics is "Statutes of Limitation." There is no topic or subtopic for repose provisions. Case law rules regarding repose provisions are simply indexed under the topic "Limitation of Actions" and the subtopic "Statutes of Limitation."

Not to omit LexisNexis, in the index to the General Statutes of North Carolina, which LexisNexis publishes, the umbrella heading "Statute of Limitations" includes more than 260 subtopics, including "Repose, Statute of." *See* General Statutes of North Carolina, General Index J to Z, at 1227-34. Under "Statute of Repose," in contrast, are only 3 subtopics and a cross-reference to "Statute of limitations generally, See STATUTE OF LIMITATIONS." *Id.* at 1233. In short, "statute of limitations" has been the umbrella term, while "statute of repose" has been the narrower term.

II. SECTION 9658 IMPLIEDLY PREEMPTS NORTH CAROLINA'S REPOSE PROVISION.

Section 9658 also impliedly preempts North Carolina's repose provision because that provision "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001) (presence of express preemption provision did not prevent working of ordinary implied preemption principles).

A. The State provision poses an obstacle to CERCLA's purposes and objectives.

Section 9658 was enacted to prevent plaintiffs injured by exposure to hazardous substances released into the environment from a facility from being deprived of their day in court by state statutes that run before the plaintiffs discover the cause of their latent harm. H.R. Conf. Rep. No. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. As the study group recognized, that purpose can be frustrated by either a statute of limitations without a discovery rule or by a statute of repose. Moreover, the problem of plaintiffs being deprived of their day in court "is probably most likely to occur where statutes of repose operate." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008). As the court below observed, "Refusing to apply § 9658 to statutes of repose allows states to obliterate legitimate causes of action before they exist," which is "precisely the barrier that Congress intended § 9658 to address." Pet. App. 15a. "Doing so cannot be termed an honest attempt to 'effectuate Congress's intent'." *Id.*

A statute of limitations without a discovery rule and a "statute of repose" can have the exact "same effect" of barring plaintiffs' claims before they know they have them. Study Group Report at 241. Indeed, a statute of limitations without a discovery rule and a "statute of repose" can begin to run at the same time—when the defendant last acts or fails to act. The Study Group Report commissioned by Congress repeatedly expressed concern with the problem of latent harm from hazardous substances and the importance of a discovery rule. *See* Study Group Report at 8, 16-17, 28, 31, 55, 116, 240, 242, 244-45, A-3, B-1, L-17, L-20. And Congress agreed with the study group that individuals with latent harm from hazardous substances should not be deprived of relief by limitations periods that begin before they discover their harm. *See* H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

"[D]iscovery rule[s] exist[] in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1222 (2013). In enacting section 9658, Congress responded to the study group's concern that claims based on latent harm from hazardous wastes released into the environment from a facility call for such a discovery rule. CTS does not disagree. Pet. Br. 52. Construing section 9658 to apply to limitations periods that include repose periods furthers this statutory purpose. Not only do repose provisions have the same effect as statutes of limitation without discovery rules,

they were enacted as a *reaction* to discovery rules. *Hinkle*, 85 F.3d at 302 ("probably all statutes of repose . . . are surgical strikes by the legislature against the discovery rule").

Uniform preemption of less favorable commencement dates is especially appropriate because hazardous wastes released into the environment can cross state lines, and victims of the same environmental release in neighboring states might be subject to differing commencement dates, with those in a state with a repose provision potentially barred before they even knew of their harm, depending on their forum state's choice of law rules. Uniformity is also appropriate because states might otherwise have an incentive to pass more restrictive provisions to compete for hazardous waste producers, further frustrating Congressional intent to provide victims of latent harm their day in court. In fact, the government made this very point in *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002). *See* Brief for Intervenor United States, *Freier v. Trico Prods. Corp.*, Nos. 00-7724, 00-7728, 2000 WL 33996142, at *15 (2d Cir. Nov. 6, 2000) (hereafter "U.S. *Freier* Br.") ("A uniform limitations trigger . . . prevent[s] States from seeking to adjust this element of their law in order to attract investment."). Such competitive legislation would frustrate the statutory goal that responsible parties bear the costs of clean-up.

In *Freier*, the government, which intervened to support individual plaintiffs pursuing tort claims, argued that the "federally required commencement date" creates a "uniform trigger" that overrides earlier state commencement dates. *Id.* at 1, 15, 26-27. Further, the government noted that "it is difficult to jus-

tify insistence on rigid application of limitations laws to the personal injury and property damage claims affected by the [federally required commencement date]." *Id.* at 37. In light of CERCLA, any "reasonable expectation of repose State court defendants might have had has been altered already. . . . [and therefore] it seems anomalous to give defendants special protection from personal injury claims." *Id.*

Consistent with the government's argument in *Freier*, the court below relied in part on the remedial nature of CERCLA and the rule that remedial statutes are broadly construed. Pet. App. 14a-15a; *see Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987). Likewise, nearly every circuit has referred to the rule with approval in construing CERCLA. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996); *United States v. E.I. DuPont de Nemours & Co.*, 432 F.3d 161, 185 (3d Cir. 2005); *Uniroyal Chem. Co., v. Deltech Corp.*, 160 F.3d 238, 242 (5th Cir. 1998); *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994); *United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 707 n.5 (7th Cir. 1998); *United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *Hanford Downwinders Coalition, Inc., v. Dowdle*, 71 F.3d 1469, 1481 (9th Cir. 1995); *Colorado v. Idarado Mine Co.*, 916 F.2d 1486, 1492-93 (10th Cir. 1990); *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 (11th Cir. 1996). *But see East Bay Mun. Util. Dist. v. U.S. Dept. of Commerce*, 142 F.2d 479, 484 (D.C. Cir. 1998) (questioning remedial statutes canon).

If ever a statute were "remedial," it is section 9658, which was enacted after Congress appointed the

study group to evaluate "barriers to recovery posed by existing statutes of limitations" and "address the need for revisions in existing statutory or common law." 42 U.S.C. §§ 9651(e)(3)(F), (e)(4)(A). The study group identified statutes of limitation that begin to run before latent harm is discovered as the primary barrier to recovery, and Congress acted to prevent plaintiffs with latent harm from being deprived of their day in court. Construing section 9658 not to preempt repose provisions would frustrate that remedial purpose. *See* Van R. Delhotal, *Re-examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 Washburn L.J. 415, 457 (1995) (section 9658 "must apply to statutes of repose as well as statutes of limitations. It simply defeats congressional intent to hold otherwise . . . .").

B. CTS and the government misread the legislative history.

CTS and the government misread the legislative history in several ways. First, they wrongly state that the Study Group Report "repeatedly distinguished between statutes of limitation and statutes of repose," made two separate recommendations regarding statutes of limitation and statutes of repose, and noted that North Carolina had adopted a statute of repose. Pet. Br. 33, 34; U.S. Br. 25, 26, 33. In fact, the Report used the term "statutes of repose" to describe repose provisions just once in more than 700 pages, on the single page cited by CTS as an "example." Pet. Br. 33 (citing Study Group Report at 241). There, the Report stated that "statutes of repose . . . in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows he has one." Study Group Report at 241. That statement

is indeed accurate because, as noted above, the period of both a statute of limitations without a discovery rule and a repose provision can run before a plaintiff is even aware of his harm.

In addition, while the Study Group Report twice summarized North Carolina's applicable statute of limitations, including its repose provision, it did not use the term "repose." Study Group Report at B9-10, B63. Instead, the Report included the North Carolina provision and similar repose provisions in other states in its analysis of "statutes of limitation" in the appendix entitled "Statutes of limitation applicable to actions arising out of hazardous waste disposal." *Id.* at B-1, B6-8 (summarizing Connecticut and Kansas statutes).

Reflecting the treatment of repose periods as provisions within state statutes of limitations, the Study Group Report made a single recommendation with respect to the period of time within which suit may be brought. In a subsection entitled "Statute of limitations," it recommended that:

> all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended to also cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows that he has one.

Id. at 241. In response, Congress did not wait for the states to act. It enacted a provision mandating a federal discovery rule. That provision, section 9658, preempts all state limitations that provide a "com-

mencement date which is earlier than the federally required commencement date."

Finally, CTS and the government quote Representative Glickman out of context in arguing that section 9658 represents a legislative compromise against preemption of "substantive" law and tort damages. Pet. Br. 50; U.S. Br. 32. In the quoted passage, Representative Glickman was speaking out against an amendment that would have created a federal cause of action. *See* 131 Cong. Rec. 35647 (Dec. 10, 1985). As to section 9658 preemption of state limitations periods, however, Representative Glickman *supported* a uniform discovery rule in cases of latent harm from exposure to hazardous substances, stating:

> [C]urrently residents of some States have no right to sue for damages arising from hazardous substances because the State statute of limitations applicable to their claim has already passed before they even know they have been injured.
>
> . . .
>
> [U]nder this provision, *all persons, regardless of which State they live in, will be able to sue for damages when they know they have been damaged*. This is of particular importance because of the long latency period for many injuries resulting from exposure to hazardous substances.
>
> . . .

Id. at 35640 (emphasis added). Similarly, Representative Snyder noted with approval section 9658's "uniform approach . . . requiring that the State's statute may not begin" until discovery. *Id.* at 35644.

In short, Congress intended to preserve state law causes of action for personal injury or property damages from hazardous wastes released into the environment from a facility until plaintiffs had discovered the cause of their harm. Construing section 9658 not to override North Carolina's repose provision would frustrate that intent.

III. CTS'S COUNTERARGUMENTS ARE UNPERSUASIVE.

CTS and the government make several additional arguments to support their view that section 9658 does not apply to state repose provisions. All are meritless.

First, CTS invokes the presumption against preemption. To begin with, where, as here, the scope of preemption is clear from the statutory language, the Court has not looked to the presumption. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004). Further, the presumption has no place where the preemption of state law (repose periods) will allow another state law (common-law claims) to be given effect.

Moreover, although the North Carolina repose provision concerns an area traditionally within a state's historic police powers (the period during which state-law claims may be brought), that traditional state authority gives way when Congress enacts a "comprehensive federal program" that displaces state authority as to the subject of that program. *See Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012) (traditional state authority to regulate employment relationship displaced by comprehensive federal immigration legislation); *Wisconsin Dep't of Indus., La-*

bor & Human Relations v. Gould Inc., 475 U.S. 282, 287-88 (1986) (state's power to control spending of its own funds preempted when used to interfere with federal "comprehensive regulation of industrial relations"). CERCLA is such a "comprehensive federal program." As the government has previously argued, section 9658's "federally required commencement date" is "integral" to this comprehensive federal program, "because it is closely linked to CERCLA's other provisions addressing and preventing harms resulting from exposure to hazardous materials." U.S. *Freier* Br. 21. A state's interest in protecting defendants from older claims is overcome in this instance:

> The countervailing State interest in protecting potential defendants is substantially weaker. Not only do such commercial entities operate in an area that is already heavily regulated, but they are also subject to CERCLA's provisions imposing liability for cleanup costs and natural resources damages irrespective of when the activity that render them liable occurred. Those provisions embody a Congressional decision that places great importance on ensuring that these costs are paid, and that can apply to acts that occurred many decades in the past. . . . To the extent that they may be inconvenienced by such suits, Congress has already made a judgment in CERCLA that a defendant's interest in repose, and the presumptions of tort law that often leave costs where they fall, are less important than the need to spread the social costs associated with the harms resulting from hazardous materials, and to internalize those costs to the responsible industries.

Id. at 36 (citations omitted).

Second, invoking the avoidance canon, CTS argues that section "9658 would raise serious constitutional doubts if it were construed to force states to impose substantive tort liability as a matter of state law" because it would essentially "compel[] state legislatures to enact tort causes of action." Pet. Br. 37, 38. This argument, which was neither raised nor decided below, has been waived. *See United States v. Appel*, 134 S. Ct. 1144, 1153 (2014) (declining to reach constitutional questions not reached below and First Amendment objections presented "as a statutory interpretation argument based on constitutional avoidance"). It is also meritless.

CTS agrees that section 9658 preempts state statutes of limitations such as North Carolina's three-year period for bringing an action after discovery, but it argues that preempting "statutes of limitations" raises no concerns because those periods are "procedural" while "statutes of repose" are "substantive." Pet. Br. 40-41. That distinction cannot make a difference here, however, as the Court has on many occasions read federal law to preempt state substantive law, without suggesting the sort of constitutional conundrum posed by CTS. *See, e.g.*, *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel*, 552 U.S. 312.

Further, the avoidance canon "does not apply unless there are 'serious concerns about the statute's constitutionality.'" *Gonzalez v. United States*, 553 U.S. 242, 251 (2008) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002)). This case presents no such concerns. The federally required commencement date is "an 'ordinary instance' of federal preemption of

State law," U.S. *Freier* Br. 25-27, as it has been established for over a century that Congress may alter state limitations periods. *Id.* at 27-33. And there is no merit to CTS's suggestion (Pet. Br. 40) that preemption is a sort of one-way street entitled to more deference when Congress "negates" state substantive law rather than enlarging it. *Id.* at 25 ("Although the displacement of State law through federal preemption is most often thought of as involving the constriction of State remedies, preemption in fact routinely has the effect of expanding those remedies.").

As the Second Circuit explained in rejecting a "commandeering" argument very similar to CTS's:

> Simply put, the Tenth Amendment does not prevent the application of federal law in state courts even though "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," because "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. [144,] 178–79 [1992]. The [federally required commencement date], which requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment.

Freier, 303 F.3d at 205.

Third, CTS raises the specter of excessive preemption of state repose provisions. *See* Pet. Br. 53 (the effect of the Fourth Circuit's reading is that "*every* state statute of repose – no matter how reasonable, no matter how minimally burdensome to plaintiffs – is

preempted") (emphasis in original); *see also* Am. Chem. Council Br. 6. This floodgates argument is easily dismissed.

Section 9658 by its plain terms can apply only when there has been a "release" into the "environment" of a covered "hazardous substance" from a "facility." 42 U.S.C. 9658(a)(1). While the brief of the American Chemistry Council (at 15-16) discusses only one of these four prerequisites (hazardous substances), all four prerequisites must be present for section 9658(a)(1) to apply. *See First United Methodist Church v. United States Gypsum*, 882 F.2d 862, 867 & n.6 (4th Cir. 1989) (section 9658 preemption inapplicable to claims for cost of removing asbestos from the structure of a building, where asbestos created a hazard only within that building); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988) (section 9658 preemption inapplicable because the interior of a place of employment is not the "environment" so as to satisfy the "into the environment" requirement); *Greco v. United Techs. Corp.*, 890 A.2d 1269, 1281-86 (Conn. 2006) (plaintiffs' allegations of contamination did not meet the requirement of a release into the "environment"); *Morgan v. Exxon Corp.*, 869 So. 2d 446, 449-52 (Ala. 2003) (section 9658 inapplicable because plaintiffs failed to satisfy hazardous substances element).

Moreover, Respondents are not aware of a single state with a repose provision that specifically bars latent harm from environmental contamination. *Cf.* Alaska Stat. § 09.10.055(b)(1)(A) (ten-year statute of repose does not apply if personal injury, death, or property damage resulted from prolonged exposure to hazardous waste); Conn. Gen. Stat. § 52-577c(b) (limi-

tations period for actions for personal injury or property damage caused by exposure to hazardous chemicals released into the environment runs from discovery of harm). The question presented here will thus affect only the few states with general repose provisions or common law rules of repose applicable to all personal injury or property damage claims. *See* Conn. Gen. Stat. §§ 52-577, 52-584[1]; Kan. Stat. Ann. § 60-513(b); N.C. Gen. Stat. § 1-52(16); Or. Rev. Stat. § 12.115; *see also Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225 (S.D. Ala. 2009) (discussing Alabama's twenty-year common law rule of repose and holding that section 9658 preempts it).

Fourth, the government argues that Congress did not intend CERCLA's "remedial focus" to extend to tort damages. U.S. Br. 32-33. CERCLA's plain language refutes this argument. Section 9658 applies to "any action brought under State law *for personal injury, or property damages*." 42 U.S.C. § 9658(a)(1) (emphasis added). In addition, in section 9658's statutory history, Congress directed the study group to evaluate "the adequacy of existing common law and statutory remedies in providing *legal redress for harm to man and the environment*." *Id.* § 9651(e)(1) (emphasis added). The study group in turn noted the availability of remedies for personal injury and property damage under state law claims for nuisance, trespass, negligence, and strict liability. Study Group

---

[1] Connecticut appellate courts have not addressed whether section 52-577c(b)'s discovery rule for hazardous waste cases controls over sections 52-577 and 52-584, which begin to run at the defendant's last act or omission. *See Taska v. ACMAT Corp.*, No. CV 09 5024323, 2012 WL 1959233, at *4 (Conn. Super. Ct. May 7, 2012). *See also Durham Mfg.*, 294 F. Supp. 2d at 278.

Report at 27, 52, 80. The study group even noted that the government might be liable under the Federal Tort Claims Act if it owned the disposal site or waste and its employees or agents committed a tort. *Id.* at 59. Thus, CERCLA section 9658 was very intentionally directed at extending the period for filing tort actions based on harm from hazardous waste, as part of Congress's effort to remedy the problems caused by such environmental hazards.

In addition, in *Freier*, the government took the opposite position and successfully argued that section 9658 supports tort damages. *See* U.S. *Freier* Br. 1, 7, 11-16, 19 n.8, 21-22, 37. As the government stated, that case "involve[d] a range of tort claims under New York law for injuries or deaths allegedly caused by exposure to toxic substances." *Id.* at 7. After intervening on behalf of the plaintiffs, the government explained:

> [T]ort damages have a well-understood deterrent function. In enacting the FRCD provision, Congress found that tort actions seeking compensation for injuries caused by such wastes often were impeded by restrictive State limitations periods. By altering these limitations periods, the FRCD serves to deter future acts of improper hazardous waste disposal by commercial entities. . . .

Id. at 13. The government further observed that "the payment of compensation for those harms can have substantial economic effects, for instance by permitting plaintiffs to pay for medical bills or other necessary costs." *Id.* at 19 n.8.

> CERCLA does more than merely address cleanup of waste sites and allocation of costs of those cleanups. . . .

> . . .
>
> . . . Not only does the deterrent effect of tort actions reduce the likelihood of future injury, payment of compensation can benefit human health immediately by allowing the injured to pay for necessary medical care. The FRCD also applies to claims for harm to property; in this respect, it complements the provisions of CERCLA directed at cleaning up contaminated sites.

Id. at 21-22.

Finally, amicus DRI proposes that individuals such as Respondents "can remove or remediate contamination and then file a private cost-recovery action." DRI Br. 14 n.3. Expecting individual homeowners in the Blue Ridge Mountains community of Skyland, North Carolina to remove or remediate the contamination themselves is ludicrous. Even if they had the wherewithal to do so, they would have to trespass, as the source of the contamination is not on their own land. And then afterward, they would still have to go to court, as DRI acknowledges. *Id.* There is no suggestion in the statutory text or history that Congress envisioned that the burden of hazardous waste clean-up would fall in the first instance on the individuals harmed by the waste. *See also Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (CERCLA was designed to ensure parties responsible for the contamination would bear costs of clean-up).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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REPLY

Having abandoned the reasoning of the decision below, Respondents now invoke policy arguments, snippets of legislative history, and vague declarations of legislative purpose. These efforts are unavailing. Text, canons of interpretation, and historical sources all point to the same conclusion: § 9658 does not affect statutes of repose.

I. BY ITS TERMS, § 9658 APPLIES ONLY TO STATUTES OF LIMITATIONS, NOT STATUTES OF REPOSE

The plain text resolves this case. In short, § 9658 is not best read—indeed, cannot sensibly be read—to affect statutes of repose.

A. On Its Face, § 9658 Unambiguously Applies Only To Statutes of Limitations

Section 9658 does nothing more or less than postpone a state-law "commencement date." § 9658(a)(1). That simple fact dooms Respondents' case.

First, Respondents' reading is incompatible with § 9658's definition of the term "commencement date." Under § 9658, a "commencement date" is the date that begins an "applicable limitations period," which is in turn defined as the period when a civil action "may be brought." § 9658(b)(2)-(3). A "commencement date" thus marks the date when the plaintiff's claim has accrued or, equivalently, when the plaintiff's claim "may be brought" under state law. That definition perfectly captures statutes of limitations, which run from accrual. *See* Pet. Br. 21-23. Indeed, North Carolina's statute of limitations, which adopts a discovery rule, expressly runs from the date when a claim has "accrue[d]." N.C. Gen. Stat § 1—52(16); *see*

also Merck & Co. v. Reynolds, 559 U.S. 633, 644 (2010) (describing the discovery rule "in the statute of limitations context" as "a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it"). In addition, Congress's focus on accrual—that is, the date when an action may *commence*—explains why § 9658 uses the term "*commencement* date." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) ("[A]n action *accrues* when the plaintiff has a right to *commence* it" (second emphasis added and internal quotation marks omitted)).

By contrast, the beginning of what Respondents call a "period of repose" has no necessary or logical connection with when a claim "may be brought." This point, too, is reflected in North Carolina law, as that State's statute of repose begins to run from the defendant's last action, regardless of whether a claim has or could have accrued. *See* N.C. Gen. Stat § 1—52(16) (providing a statute of repose running from the "last act or omission of the defendant"). Because statutes of repose do not run from the date when a claim "may be brought," they do not have a "commencement date" within the meaning of § 9658. Therefore, statutes of repose cannot possibly be affected by § 9658. This textual point would resolve this case even if the phrase "statute of limitations" were understood to encompass statutes of repose.

In an attempt to expand § 9658's statutory definitions, Respondents cite cases that use phrases such as "may be brought" in connection with statutes of repose. *See* Resp. Br. 18. But these sources only confirm that statutes of repose dictate the back-end point in time beyond which a claim may *not* be brought. *See id.* (quoting *Boudreau v. Baughman*,

368 S.E.2d 849, 857 (N.C. 1988) ("'If the action is *not* brought within the specified period,' a plaintiff has *no* cause of action" (emphases added)); *Bernick v. Jurden*, 293 S.E.2d 405, 413 (N.C. 1982) (distinguishing a statute of limitations from "a statute of repose," which "places *a cap or outer limit* on the time period within which a products liability action may be brought" (emphasis added)); *Hodge v. Harkey*, 631 S.E.2d 143, 145 (N.C. Ct. App. 2006) ("*[N]o* cause of action may be brought *more than ten years after the defendant's last act* or omission." (emphases added))). A statute of repose simply does not begin to run when a civil suit has accrued or "may be brought."

Later, Respondents collect various state laws, but those quotations only further show that statutes of repose do not begin to run or (as Respondents would have it) "commence" when suit "may be brought." *See* Resp. Br. 19 (quoting Kan. Stat. Ann. § 60-513 ("*[I]n no event* shall an action be commenced more than 10 years *beyond the time of the act* giving rise to the cause of action" (emphases added)); Or. Rev. Stat. § 12.115(1) ("*In no event* shall any action . . . be commenced *more than 10 years from the date of the act* or omission complained of." (emphases added))). The North Carolina statute of repose at issue here is to precisely the same effect. *See* N.C. Gen. Stat § 1—52(16) ("Provided that *no* cause of action shall accrue *more than 10 years from the last act* or omission of the defendant giving rise to the cause of action.") (emphases added)).

In seeking to conflate statutes of limitations and statutes of repose, Respondents mistakenly focus on the accurate point that both of those time limitations impose back-end restrictions on when suit may *not* be

brought. *See* Resp. Br. 18. Here, for example, North Carolina's statute of repose provides that a suit may *not* be brought more than 10 years following the defendant's last action, whereas North Carolina's statute of limitations provides that a suit may *not* be brought more than 3 years following accrual. *See* N.C. Gen. Stat § 1—52(16). But that limited similarity is beside the point, for § 9658 is not concerned with, and in no way modifies, those back-end dates. Instead, the *only* state-law rule affected by § 9658 is the state "commencement date" that defines when a civil suit "may be brought" under state law. And only a statute of limitations can have such a "commencement date," because only a statute of limitations begins to run from when suit "may be brought."

In another attempt to evade the clear import of the statutory definitions, Respondents exhibit a fundamental misunderstanding of the statutory scheme. According to Respondents, Petitioner has made a "mistake" because § 9658 draws no connection between the state-law "commencement date" and the date when a civil action "may be brought." Resp. Br. 19; *see also id.* at 19-20 (arguing that "[t]he phrase 'a civil action . . . may be brought' is from the definition of 'applicable limitations period,' not from the definition of 'commencement date'"). But § 9658 explicitly links the state-law "commencement date" with the date when a suit "may be brought." To repeat: the definition of "commencement date" is "the date specified in a statute of limitations as the beginning of the applicable limitations period." § 9658(b)(3). And the phrase "applicable limitations period" is in turn defined as "the period specified in a statute of limitations during which a civil action . . . may be brought." § 9658(b)(2). Therefore, a "commencement date" is

the "beginning" of the period "during which a civil action . . . may be brought." § 9658(b)(2)-(3). As explained above, that plain statutory meaning applies only to the date when a statute of limitations, not a statute of repose, begins to run. Respondents have failed to apprehend this dispositive point.

Second, Respondents do not come to terms with the fact that the statute affects only a singular "commencement date." As Petitioners have explained, the statute's repeated use of definite articles and singular nouns demonstrates that the Act postpones a single state-law "commencement date." Pet. Br. 24-25. And, when faced with the choice between postponing the running of North Carolina's statute of limitations or its statute of repose, the answer is clear: Congress meant to postpone the "statute of limitations"—that is, the time period that is expressly referenced five separate times in § 9658 and that has a function analogous to the federal discovery rule (which also runs from the date of accrual). Not even Respondents would seriously contend that § 9658 postpones only the running of statutes of repose, while allowing statutes of limitations to run without alteration.

In addressing this independently decisive argument, Respondents concede that § 9658 "preempts only 'one state-law time period,'" but insist that "[t]he dispute here is how to define that time period." Resp. Br. 24. In Respondents' view, "the repose period is plainly *part of* the 'state-law time period' in which claims can be brought under North Carolina law." *Id.* at 24-25 (emphasis added). This view cannot withstand scrutiny. North Carolina law has clearly defined two distinct time periods that frequently—indeed, typically—both begin and end at different

times: first, a statute of limitations that runs for three years from the discovery of injury; and, second, a statute of repose that runs for ten years from the defendant's last act. Pet. App. 10a; *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990). Neither time period is "part of" the other. In fact, the two periods do not even have to overlap. It would be senseless to say, for instance, that a time period spanning from 1990 to 2000 is "part of" a time period from 2010 to 2013. Yet Respondents must say just that.[1]

Third, Respondents' position separately fails because, once a statute of repose has run, there can *never* be a state-law "commencement date" under § 9658. As the statutory text makes clear, § 9658 applies only when there is a state-law "commencement

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[1] While still acknowledging that § 9658 affects only a single time period, Respondents offer (Resp. Br. 25) a glancing "see also" cite to the notion that singular words can sometimes connote plural referents, as when a prohibition on using a single firearm applies to the use of two. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 130 (2012) (discussing 1 U.S.C. § 1 ("[U]nless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties, or things.")). Respondents are right not to advance any argument based on this precept, which has applied only in "rare occasions" where "doing so was 'necessary to carry out the evident intent of the statute.'" *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (citation omitted); *see also id.* at 421 (noting that a statute "uses the word 'element' in the singular, which suggests that Congress intended to describe only one required element"). Here, neither "context" nor Congress's "evident purpose" make it "necessary" to revise § 9658's plain text.

date"—that is, a date when a "civil action . . . may be brought" under state law. § 9658(b)(2). But no such date can possibly exist once the relevant statute of repose has run. And, without a "commencement date" to postpone, § 9658 can have no legal effect.

That situation aptly describes this very case. Respondents allege that they became aware of their purported injury in 2009, whereas Petitioner's last action occurred in 1987. *See* Resp. Br. 13. Based on those allegations, Respondents believe that their claim accrued under North Carolina law in 2009, *see* Plaintiffs' Opp. to MTD, Dkt. 13, at 14 (May 19, 2011) ("Plaintiffs' cause of action did not accrue in this case until . . . 2009."), but that is incorrect. Because the statute of repose ran before accrual could occur, there was *never* a date when, under state law, Respondents' suit could have been "brought." § 9658(b)(2). It follows that there was *never* a "commencement date" capable of being postponed by § 9658. Petitioner featured this independently dispositive argument in its Opening Brief, *see* Pet. Br. 18, 23-24, but Respondents have made no mention of it.

In sum, Respondents' have put forward no coherent reading of § 9658 that would allow its application to statutes of repose.

B. In 1986, Congress Understood The Term "Statute of Limitations" To Exclude Statutes of Repose

When enacting § 9658, Congress did not understand the term "statute of limitations" to encompass statutes of repose. Thus, at a minimum, § 9658 is *best* read not to encompass statutes of repose.

In 1986, when § 9658 was enacted, the law of time bars was experiencing a sea change. States had in-

creasingly revised their statutes of limitations so as to make them run from the date that the plaintiff discovers the fact or source of injury. *See* Pet. Br. 30. In order to recalibrate tort law and continue respecting defendants' interests in finality, many states responded by tempering their discovery rules with "statutes of repose." While that phrase had long been used as an umbrella term encompassing all time limitations, it gradually acquired a narrower meaning, referring to the elimination of a substantive cause of action after a prescribed period of time, regardless of whether a claim has accrued. *See id.* at 30-31; *see also* Resp. Br. 4; Br. of Envtl. Law Professors 5-6 ("Profs. Br."). Thus, the distinctive meaning of the phrase "statute of limitations" had special salience when Congress enacted § 9658.

Many authorities contemporaneous with § 9658—including judicial decisions, legal dictionaries, leading commentaries, and witness testimony during congressional hearings—all used or defined the phrase "statute of limitations" with reference to the date when a plaintiff's cause of action accrues. *See* Pet. Br. 27-34. In addition, Congress's own study group drew a clear terminological distinction between "statutes of limitations" and "statutes of repose." *See* Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies, at 241 (Comm. Print 1982). The study group also repeatedly listed the North Carolina statute of limitations at issue in this very case as the applicable "limitations period." *See* Appendix B-9, B-63. Thus, any minimally informed legislator would have understood that the phrase "statute of limitations" did not encompass what we would today call a statute of repose.

Given all this, § 9658 is best read—according to its terms—to apply only to "statutes of limitations," not statutes of repose. Indeed, even Respondents' own *amici* acknowledge the "default presumption that a 'limitations period commences when the plaintiff has a complete and present cause of action,' which is also referred to as the time that the cause of action 'accrues.'" Profs. Br. 8 (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005)); *see also* U.S. Br. 19 (same). That "default presumption" dictates that § 9658 is best read as limited to time periods beginning with accrual. In repeatedly using the term of art "statute of limitations," as well as the related term "applicable limitations period," Congress was legislating against a settled background norm that these time periods begin with accrual. *Id.* Therefore, by "default," *Graham Cnty.*, 545 U.S. at 418-19, Congress was *not* referencing time periods beginning at other, more exotic points in time.

In arguing to the contrary, Respondents fail to establish textual ambiguity, much less the superiority of their reading.

Begin with the 1979 edition of *Black's Law Dictionary*, which defined "statute of limitations" with reference to the date when a plaintiff's cause of action has first "accrued." *Black's Law Dictionary* 835 (5th ed. 1979). That definition readily applies to statutes of limitations but excludes statutes of repose, which do not run from accrual. *See* Pet. Br. 21-22. As Respondents observe (Resp. Br. 25), the 1979 edition also noted that statutes of limitations are statutes of repose, but that only shows that the term "statute of repose" was still being used as an umbrella term.

See supra p. 8. The term that Congress actually used in § 9658—"statute of limitations"—was clear. As an aside, Respondents argue that the 1979 edition included a listing for "repose period," Resp. Br. 25-26 (citing *Black's Law Dictionary* 1169 (5th ed. 1979)), but that phrase—which is not even in § 9658—was just another umbrella term.

Respondents' other cited dictionaries (Resp. Br. 26-27) are to much the same effect. With varying degrees of clarity, most of these relatively obscure volumes tend to follow the 1979 edition of *Black's Law Dictionary* by defining "statute of limitations" with reference to the accrual of a claim. For example, one dictionary refers to when plaintiffs "must take judicial action *to enforce rights* or else be thereafter barred from enforcing them." Steven H. Gifis, *Dictionary of Legal Terms* 412 (1983) (emphasis added); *see also* Wesley Gilmer, Jr., *The Law Dictionary* 309 (1986) (noting that a statute of limitations combined with a statute of repose is "sometimes called" a "*hybrid* statute of limitations" (emphasis added)). In any event, there are always errant dictionary definitions, but that is not enough to establish ambiguity. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225-26 (1994).

Respondents next reach for a handful of this Court's decisions, *see* Resp. Br. 27, but here too Respondents come up short. The first case used the term "statute of limitations" to refer to a bifurcated provision allowing for the application of *either* a discovery rule *or* a traditional rule running from the date of injury (when the "violation" is complete). *See Merck & Co.*, 559 U.S. at 638. Another case used the term "statute of limitations" in a sentence referring

to both a statute of limitations and a statute of repose. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976). That statement was ambiguous as to whether the statute of repose was distinct or part of the statute of limitations. Finally, the footnote of one case did clearly use the term "statute of limitations" to refer to a hybrid provision containing both a statute of limitations and a statute of repose. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 n.8 (1991). Yet that isolated case postdated § 9658's enactment and emphasized the differences between the paired rules. For instance, it distinguished the "two periods" and held that only one was substantive and therefore unsusceptible to equitable tolling. *Id.*; *see also* U.S. Br. 21-22.

Respondents also briefly point out that North Carolina's statute of repose is codified in a statutory section whose heading happens to include the word "Limitations." Resp. Br. 18 (citing N.C. Gen. Stat § 1—52(16)). Because the statutory section does not use the legally operative term "statute of limitations," Respondents' argument stumbles out of the gate. In any event, it is black-letter law in North Carolina that the State's statute of limitations is distinct from its statute of repose. *See, e.g.*, Pet. App. 10a. And Respondents have supplied no reason to doubt the binding determination of North Carolina courts on a matter of state law. Thus, the ten-year statute of repose at issue in this case does not establish a "period specified in a statute of limitations." § 9658(a)(1).

In the end, Respondents' effort to establish ambiguity is not just futile but beside the point. Legal terms of art—including mainstays like "jurisdiction" and "standing"—are sometimes misused, including by

this Court. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) ("This Court, no less than other courts, has sometimes been profligate in its use of the term" jurisdiction.); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 12-873, 2014 WL 1168967, at *6 & n.3 (U.S. Mar. 25, 2014) (standing).

Respondents underscore this point by citing decisions that acknowledged the proper meaning of the term "statute of limitations," even as they adopted a different meaning to benefit claimants. *See* Resp. Br. 27; *e.g.*, *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136, 142 (2d Cir. 2013) ("Although statutes of limitations and statutes of repose are distinct in theory . . . ."); *Moore v. Winter Haven Hosp.*, 579 So. 2d 188, 189 (Fla. Dist. Ct. App. 1991) ("Although we recognize the distinctions in the application of a statute of repose as opposed to a general statute of limitations . . . ."); Resp. Br. 28 (citing search engines). These errant usages cannot dislodge the primary or best reading of a term of art. *See Black's Law Dictionary* 1546 (9th ed. 2009) (distinguishing the terms); John C. P. Goldberg et al., *Tort Law* 412, 419 (2004) (same). This is particularly so because, again, many of Respondents' cases actually recognize the terminological distinction. *E.g.*, Resp. Br. 5 (citing *Harding v. K. C. Wall Products, Inc.*, 150 Kan. 655, 667 (1992)).

In 1986, the overwhelming weight of authority—including its own study group—supplied Congress with ample notice that a "statute of limitations" ran from accrual. For that reason, too, Respondents' reading must fail.

II. FEDERALISM CONCERNS AND RELATED CANONS OF INTERPRETATION PRECLUDE RESPONDENTS' READING

Even if § 9658 were ambiguous, settled principles of statutory construction would preclude its application to statutes of repose.

A. The Presumption Against Preemption And Principles of Federalism Control This Case

Founded on the sovereign dignity of States, the presumption against preemption holds that any ambiguity as to the scope of federal preemption must be resolved against preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Since even the decision below found the scope of § 9658 to be ambiguous, *see* Pet. App. 11a, the presumption against preemption makes this an easy case. Respondents' scant arguments against the presumption are unpersuasive.

To begin with, Respondents posit (Resp. Br. 36) that § 9658 clearly applies to statutes of repose. That unexplained claim is extraordinary. The statute speaks only of a "statute of limitations," and no court, including the decision below, has gone so far as to hold that § 9658 clearly extends to statute of repose. Instead, the decision below and its ilk have *expressly* found the scope of § 9658 to be ambiguous, *see* Pet. App. 11a, and even Respondents have previously endorsed that approach. *E.g.*, BIO 15 ("[T]he Fourth Circuit correctly concluded that the plain meaning of section 9658 can be read to include the statute of repose provision at issue . . . ."). Respondents' discovery of statutory clarity comes late in the day.

Next, Respondents assert—without citation—that the presumption does not apply here because preempting statutes of repose "will allow another

state law (common-law claims) to be given effect." Resp. Br. 36. But if § 9658 were read to affect statutes of repose, the result would be a federal override of fundamental state-law judgments in the domain of tort law—which is precisely what the presumption against preemption counsels against. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Compounding that problem, reading § 9658 to preempt statutes of repose would not "allow" state law to operate as intended, but would instead forcibly *compel* a substantive state-law cause of action, even where state law itself decrees that none should exist.

As their last line of defense, Respondents argue that the presumption does not apply "when Congress enacts a 'comprehensive federal program.'" Resp. Br. 36 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2503-04 (2012)). But Respondents rely on case law that explicitly incorporated the presumption against preemption. *See Arizona*, 132 S. Ct. at 2501. In any event, § 9658 does not come close to establishing a "comprehensive" program. Instead, § 9658—which was enacted years after the bulk of CERCLA—makes clear that its preemptive effect is a narrow "[e]xception" to state tort law. § 9658(a)(1). Respondents also purport to find support for their position in a fourteen-year-old court-of-appeals brief filed by the United States—even though that brief did not address the presumption, the scope of § 9658, or whether § 9658 forms part of a "comprehensive federal program." Resp. Br. 37-38 (quoting and block quoting Brief for Intervenor United States, *Freier v. Trico Prods. Corp.*, Nos. 00-7724, 00-7728, 2000 WL 33996142, at *21 (2d Cir. 2000)). The Government's *amicus* brief in this case is a better guide. *See* U.S. Br. 29.

More generally, Respondents' various arguments all fail to appreciate the critical role that the presumption against preemption plays in protecting the "integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Indeed, Respondents' brief is shot through with citations to cases where federal authority was at its zenith, in such areas as foreign affairs, immigration, and field preemption. *See* Resp. Br. 29, 36-37 (citing *Arizona*, 132 S. Ct. 2492 (immigration); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (labor relations); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied,' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action." (citation omitted)); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (immigration and foreign affairs). Conspicuously absent from Respondents' brief is any serious attention to cases where the federal government intruded on an area of traditional state concern.

Yet this case involves the scope of tort liability, which is *the* paradigmatic area of predominant state authority. *See, e.g.*, *Medtronic*, 518 U.S. at 485. And this Court has consistently recognized that interpretive canons motivated by principles of federalism must trump remedial doctrines, even when the result is to defeat potentially meritorious claims. *See, e.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Indeed, there is no need in this case to *presume* that Congress sought to minimize federal

preemption of state law, since the text and legislative history of § 9658 *demonstrate* that Congress had that goal. *See infra* Part III.

In sum, the presumption against preemption easily resolves this case, Respondents' contrary arguments notwithstanding.

B. Respondents' Position Contravenes The Canon of Constitutional Avoidance

The canon of constitutional avoidance provides an independent reason not to read § 9658 to preempt statutes of repose.

All agree that, under the Constitution, the Federal Government is empowered to displace or negate substantive provisions of state law. For example, Congress may enact legislation that displaces or negates state-law causes of action. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

But the Constitution does *not* give Congress the far greater power to control the content or existence of state law. That is why Congress cannot command States to enact or repeal legislation. *See New York v. United States*, 505 U.S. 144, 161 (1992). Such a power would subvert the basic distinction between federal and state sovereigns by permitting Congress to work its will through state law. The result would be an impermissible blurring of accountability between federal and state lawmakers. *See id.* at 168.

Respondents' reading of § 9658 directly implicates these constitutional concerns. North Carolina's statute of repose is *not* a procedural rule. Rather, statutes of repose like North Carolina's provide for the *substantive* extinguishment of state-law causes of action. *See Bolick v. Am. Barmag Corp.*, 293 S.E.2d

415, 420 (N.C. 1982). When the statute of repose has run, North Carolina's tort causes of action are effectively repealed as to the relevant defendant. This critical point explains why federal preemption of statutes of repose accomplishes much more than mere displacement or negation. If Respondents were correct, then Congress would have assumed the power to *compel* North Carolina to preserve a substantive cause of action as a matter of state law. Put another way, federal law would effectively bar North Carolina from repealing its own cause of action. This Court should construe § 9658 in a way that avoids posing this serious constitutional issue.

Respondents fail to confront the avoidance argument in this case. At the outset, Respondents seek to evade the avoidance canon by alleging forfeiture. Yet Petitioner clearly asserted constitutional doubts in its petition for certiorari, *e.g.*, Cert. Pet. 19-20 (quoting the clear-statement rule of *Gregory*, 501 U.S. at 448, 460), and had no obligation to raise every available argument when defending the judgment of the district court in the court of appeals. In any event, Respondents correctly identify the avoidance canon as an "argument," and arguments are not subject to forfeiture. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (ruling in favor of Petitioner based on an argument that Petitioner "did not raise this point below" and, in fact, had "expressly disavowed"). Confirming as much, Respondents' forfeiture allegation awkwardly rests on a case that rejected an avoidance argument *on the merits* because it would have required an arbitrary carve-out from the statutory language. *See United States v. Apel*, 134 S. Ct. 1144, 1153 (2014).

Respondents next assert that Congress often chooses "to preempt state substantive law," Resp. Br. 38, but those routine cases involve displacement or negation—not efforts to compel the existence of substantive rules of liability, even where the State seeks to eliminate them. *See id.* (collecting cases). A federal law *compelling* the existence of substantive state law would pose special problems. Respondents also cite a Second Circuit decision and, yet again, the U.S. brief in that case. *See id.* at 38-39 (quoting *Freier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002); U.S. *Freier* Br. 25-27). But neither of those sources considered the possibility that § 9658 might preempt statutes of repose. And the Government has now made clear that it *agrees with Petitioner* as to the scope of § 9658. Under that correct interpretation, all agree that § 9658 would not pose constitutional problems. That fact hardly helps Respondents.

Reading § 9658 to preempt statutes of repose would encroach on traditional state prerogatives and raise serious federalism questions. This Court should avoid that result.

III. RESPONDENTS' NEWLY MINTED IMPLIED OBSTACLE ARGUMENT IS MERITLESS

As if to acknowledge that their position has no textual foundation, Respondents ultimately abandon the words of § 9658 in favor of "obstacle" preemption. This newly minted theory is an even more untenable version of the "remedial purpose" argument that the Fourth Circuit erroneously relied on below.

On its face, § 9658 leaves no room for obstacle preemption, since it establishes only a narrow "[e]xception" while providing that "State law [is] gen-

erally applicable." § 9658(a)(1)-(2). *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest . . . ." (internal quotation marks omitted)).

Further, the purpose of § 9658 was not to promote the interests of plaintiffs, but to *balance* the interests of plaintiffs, defendants, and state sovereigns. *See* Pet. Br. 50-51. Due to this approach, plaintiffs who invoke § 9658 must rely on substantive state law, as well as many critically important state procedural rules. For example, § 9658 would have nothing to say about a State that denied plaintiffs their "day in court" by imposing an unreasonably demanding statute of limitations that expired only 24 hours after accrual. Nor would § 9658 stop a state from repealing its substantive tort law as to hazardous-waste actions. In these and myriad other ways, plaintiffs must formulate their claims within the bounds of state law. That pervasive role for state sovereigns is a feature of § 9658, not a bug.

This point is only confirmed by the legislative history on which Respondents rely. The study group report included a host of recommendations pertaining to, among other things, federal administrative remedies, joinder rules, statutes of limitations, and—yes—statutes of repose. *See* Study Group Report 240-51. Choosing from among that wide range of explicitly "procedural and substantive" recommendations, *id.* at 243, Congress singled out the problem caused by certain statutes of limitations. What is more, Congress carefully tailored its intervention in state tort law by rejecting substantive measures in favor of a purely

"[p]rocedural" reform. H.R. Conf. Rep. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. For the same reason, Congress rejected the study group's proposal to establish a "substantive" federal remedy. *See, e.g.*, 131 Cong. Rec. 35,647 (Dec. 10, 1985) (statement of Rep. Glickman); U.S. Br. 32. Congress's focus on procedural reform explains why it chose *not* to act on the study group's concerns regarding inherently substantive "statutes of repose." To the extent that Respondents disagree with the balance struck by Congress, they should seek relief in the political process—not in court.[2]

Contrary to Respondents' assertion (Resp. Br. 29), § 9658 fully achieves its purpose when read to apply only to statutes of limitations. The basic goal of any statute of limitations is to encourage "prompt" action by plaintiffs. Pet. App. 10a (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) ("[T]he general purpose of statutes of limitations" is "to protect defendants against stale or unduly delayed claims." (internal quotation marks omitted)). Precisely because they run from accrual, statutes of limitations discourage plaintiffs from sitting on their rights and thereby allowing their claims to

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[2] As Respondents' *amici* recount, Congress and the President have already provided special, albeit "limited," relief to certain hazardous waste victims. Br. of Ensminger 19 (discussing the Janey Ensminger Act of 2012, which affords relief to persons exposed to toxic substances at the Camp Lejeune military base). When enacting that deliberately "limited" measure, the political branches chose not to alter § 9658's focus on statutes of limitations and so left statutes of repose intact.

"slumber." *Gabelli*, 133 S. Ct. at 1221 (citation omitted). Inducing claimants to act "at the right time" is a paradigmatically "procedural" objective, *Massaro v. United States*, 538 U.S. 500, 504 (2003), and the discovery rule in § 9658 perfectly fits that goal. According to the study group, many state statutes of limitations held hazardous-waste plaintiffs to a standard of expedition that was unrealistic given "latent injuries." *See* Study Group Report 240-41. In § 9658, Congress legislated a more permissive standard of expedition in hazardous-waste cases: the plaintiff's duty to act expeditiously begins when she learns the cause of her injury.

Respondents also err in contending (Resp. Br. 7, 14, 16) that statutes of limitations and statutes of repose are functionally interchangeable, such that Congress must have viewed them equivalently. Unlike statutes of limitations, statutes of repose do *not* serve the goal of fostering expedition by plaintiffs. Indeed, a statute of repose can entirely run, and thereby extinguish any potential cause of action, before the plaintiff's claim has even accrued. Instead of fostering expedition, statutes of repose (including North Carolina's) promote a distinct value: finality. *See Bolick*, 293 S.E.2d at 420. They guarantee that, after a prescribed period of time, potential defendants are entitled to the security of knowing that they are no longer at risk of being brought to court for events that occurred long ago. That interest in promoting finality is distinct from Congress's objective in § 9658. And statutes of repose pursue that distinct objective through a distinct means: by providing for the elimination of the plaintiff's substantive cause of action. In providing plaintiffs with a procedural standard of expedition in hazardous waste cases,

Congress did not override States' substantive judgments as to the value of repose for defendants.

As a last resort, Respondents fall back to policy arguments and snippets of legislative history. In particular, Respondents argue for "[u]niformity" when it comes to statutes of repose. Resp. Br. 31. And Respondents also emphasize the true (though irrelevant) fact that one legislator, Representative Glickman, "supported a uniform discovery rule." *Id.* at 35 (emphasis omitted). But all agree that § 9658 establishes uniformity as to the commencement dates for (procedural) statutes of limitations. The question presented is whether that federally mandated uniformity also extends to (substantive) statutes of repose. As explained above, Congress answered that question by erring on the side of federalism and allowing fifty flowers to bloom in the area of substantive state tort law.

In § 9658, Congress chose to respect the sovereign authority of States to make choices as to substantive law—including statutes of repose. Respondents' contrary policy preference is legally irrelevant.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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No. 13-339

In the Supreme Court of the United States

CTS CORPORATION, PETITIONER

v.

PETER WALDBURGER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, providing a federal commencement date for the running of state statutes of limitations as applied to suits involving hazardous substances, 42 U.S.C. 9658, preempts a North Carolina statute cutting off liability ten years after a defendant's last relevant act or omission.

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In the Supreme Court of the United States

No. 13-339

CTS CORPORATION, PETITIONER

v.

PETER WALDBURGER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented is whether a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9658, affects the operation of a North Carolina state statute cutting off substantive liability ten years after a defendant's last relevant act or omission in a case involving injury allegedly caused by hazardous substances. The United States has a substantial interest in the proper resolution of this question.

Although the United States may not be sued directly under state law, the substantive restrictions on liability under state law, such as that in the North Carolina statute, apply to claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* See 28 U.S.C. 1346(b)(1), 2674

(limiting the United States' liability to circumstances in which a private person would be liable under state law); *Anderson* v. *United States*, 669 F.3d 161, 164-165 (4th Cir. 2011). To the extent that CERCLA is held to preempt statutes like North Carolina's, those statutes would therefore also be unavailable to the United States in negligence actions under the FTCA that involve alleged exposure to hazardous substances.

The United States has a particular interest in the interaction of CERCLA with the North Carolina statute because of ongoing litigation against the United States under the FTCA involving allegations of contaminated drinking water at the Camp Lejeune Marine Corps Base in North Carolina. The multi-district litigation panel has consolidated pretrial proceedings in those cases in the Northern District of Georgia, and the question presented in this case is currently pending before the Eleventh Circuit in connection with those proceedings. See *Bryant* v. *United States*, No. 12-15424.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. a. North Carolina law establishes a three-year statute of limitations for a variety of contract and tort claims. N.C. Gen. Stat. § 1-52 (2011). That provision contains a discovery rule of accrual, under which a cause of action for "personal injury or physical damage to claimant's property shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." *Id.* § 1-52(16). The application of this

statute of limitations is not directly at issue in this case.

In addition to the three-year statute of limitations, North Carolina law also includes a separate time limit, which North Carolina courts characterize as a statute of repose, providing that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16). That provision is a substantive one that extinguishes a cause of action based on when the defendant's last act or omission occurred, regardless of whether any plaintiff was injured at that time. *Black* v. *Littlejohn*, 325 S.E.2d 469, 474-475 (N.C. 1985). This case presents the question whether this North Carolina statute applies to extinguish the claims at issue here, or whether the statute is instead modified by federal law in a way that would render the claims timely.

b. In 1980, Congress enacted CERCLA to address releases and threatened releases of hazardous substances. CERCLA authorizes entities, including the federal government, to perform cleanup operations and then recover the costs from responsible parties. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). The statute thus creates a federal cause of action for governmental and private parties seeking to recover cleanup costs. 42 U.S.C. 9604, 9607, and 9613. It does not, however, create a federal cause of action for personal injuries or property damage. Instead, CERCLA as originally enacted directed preparation of an expert report to assess "the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the re-

lease of hazardous substances into the environment." 42 U.S.C. 9651(e)(1).

The resulting report recommended the creation of a new federal administrative remedy for persons harmed by exposure to hazardous substances, as well as several changes to state tort law to facilitate recovery in cases involving hazardous substances. *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies: A Report to Congress in Compliance with § 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) by the "Superfund Section 301(e) Study Group,"* S. Comm. on Env't and Pub. Works, 97th Cong., 2d sess. Pt. 1, at 178-251 (Comm. Print 1982) (*Study Group Report*); see *id.* at 252 (recommending that proposed reforms for personal injury actions also extend to claims involving "environmental damage to private property").

The *Study Group Report* recommended (at 240) a number of changes to state tort law that it viewed as necessary to "remove unreasonable procedural and other barriers to recovery in court action for personal injuries resulting from exposure to hazardous waste." The report recommended that States "adopt liberal joinder rules" because "the complex nature of hazardous waste litigation makes it important that the combination of a number of plaintiffs in one lawsuit be encouraged." *Id.* at 241, 242. The Study Group determined that the absence of such liberal joinder rules "in effect denies a plaintiff the opportunity to bring the action at all, unless his claim is exceptionally large." *Id.* at 242.

The *Study Group Report* also recommended (at 243) that States "revise their substantive and proce-

dural rules so as to hold contributors to injury or damage jointly and severally liable" and consider "alternative approaches to apportionment," such as one used "in third party nuclear liability in western Europe." Without such reforms, the Study Group warned, "[s]ubstantive and procedural rules that require * * * specific allocation will defeat the plaintiff's claim." *Ibid.*

Because of the "difficult" nature of causation questions in this area, the *Study Group Report* also recommended (at 245) that the States "develop and enhance causes of action that apply strict liability to the generation, transportation and disposal of hazardous wastes." The Study Group expressed concern that, without such reforms, continued application of ordinary negligence principles would impose "significant barriers to the recovery of damages for injuries from exposure to hazardous waste." *Ibid.*

The *Study Group Report* also made recommendations (at 240-241) regarding time limits for bringing claims involving hazardous substances. The report observed that, with respect to statutes of limitations, a "small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure" and that "[a]nother small number of states has not yet clearly" addressed the question whether the traditional rule should apply. *Id.* at 240. Because of long latency periods from harm by hazardous substances, the Study Group expressed concern that, in those States that followed the traditional rule, "the cause of action will usually be time barred when the plaintiff discovers his hurt." *Id.* at 240-241. The group therefore "recommend[ed] that all states that have not already done so, clearly adopt the rule that

an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause." *Id.* at 241. In addition, the Study Group separately suggested "repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows that he has one." *Ibid.*

When Congress amended CERCLA in 1986, it acted on only one of the Study Group's many recommendations: that involving the discovery rule for state statutes of limitations. Congress did not create a federal administrative remedy, preempt state joinder laws, modify state rules of joint and several liability, or establish a regime of strict liability for tort actions. Pet. App. 34a (Thacker, J., dissenting). Instead, in a provision titled "State Procedural Reform," Pub. L. No. 99-499, § 203, 100 Stat. 1695 (capitalization altered), Congress "provide[d] for a Federal commencement date for State statutes of limitations which are applicable to harm which results from exposure to a hazardous substance." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 261 (1986).

Specifically, Congress adopted a limited preemption of "the applicable [state-law] limitations period," which is defined to mean "the period specified in a [state] statute of limitations during which a civil action [relating to exposure to hazardous substances] may be brought." 42 U.S.C. 9658(a)(1) and (b)(2). Congress established that these statutes of limitations cannot begin to run before the "federally required commencement date," which is the date on which plaintiffs "knew (or reasonably should have known)" that their injuries "were caused or contributed to by the hazardous substance or pollutant or contaminant

concerned" (with a more generous rule for minors or persons who are incompetent). 42 U.S.C. 9658(a)(1) and (b)(4).

2. This case concerns property in North Carolina that formerly housed a plant for the manufacturing and disposal of electronics. Pet. App. 7a. The plant was run by petitioner and its corporate predecessor until 1985. *Id.* at 7a & n.3. In 1987, petitioner sold the property to Mills Gap Road Associates. *Id.* at 7a. Mills Gap eventually sold portions of the property to individuals. *Id.* at 8a. The respondents in this case, who were plaintiffs in the district court, are purchasers of the property and adjacent landowners. *Ibid.* In 2009, according to the complaint, two of the respondents learned from the Environmental Protection Agency (EPA) that their well water was contaminated. *Id.* at 55a (Compl. para. 34). Respondents allege that the water was contaminated while petitioner was running its plant. *Id.* at 55a-56a (Compl. paras. 30-38).[1]

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[1] In 2012, the EPA added the property at issue here to the CERCLA National Priorities List (NPL). 77 Fed. Reg. 15,276, 15,280 (Mar. 15, 2012). The NPL "is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States" and "is intended primarily to guide the EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants." *Id.* at 15,277 (citing 42 U.S.C. 9605(a)(8)(B)). The NPL "does not assign liability to any party or to the owner of any specific property," and a parcel's inclusion on the list "does not mean that any remedial or removal action necessarily need be taken." *Id.* at 15,278. Petitioner has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging addition

Respondents instituted this state-law nuisance action against petitioner in 2011. Pet. App. 9a. They seek "reclamation" of "toxic chemical contaminants belonging to [petitioner], remediation of the environmental harm caused" by the chemicals, and "monetary damages in an amount that will fully compensate them for all the losses and damages they have suffered, * * * and will suffer in the future." *Id.* at 57a.

Given that petitioner sold the property 24 years before respondents filed suit, petitioner moved to dismiss the claim based on the North Carolina statute, discussed above, which states that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-52(16); see Pet. App. 9a. Respondents do not contest that, by its terms, the North Carolina statute of repose would bar this suit. Instead, respondents urge that the statute of repose is preempted by 42 U.S.C. 9658. See Pet. App. 9a, 44a.

Accepting the recommendation of a magistrate judge, the district court granted petitioner's motion to dismiss. Pet. App. 37a-39a; see *id.* at 46a (magistrate's determination that Section 9658 does not preempt North Carolina's "substantive" ten-year limitation).

3. In a divided decision, the court of appeals reversed. Pet. App. 1a-36a.

a. The panel majority acknowledged the distinctions between statutes of limitations and statutes of repose. Pet. App. 9a-11a. A statute of limitations, it explained, operates to "encourag[e] prompt resolution of disputes by providing a simple procedural mecha-

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of the property to the NPL. See *CTS Corp.* v. *EPA*, No. 12-1256 (oral argument scheduled for Apr. 10, 2014).

nism to dispose of stale claims." *Id.* at 10a (quoting *First United Methodist Church* v. *U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), cert. denied, 493 U.S. 1070 (1990)). "In contrast, a statute of repose 'bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered the resulting injury.'" *Ibid.* (quoting *Black's Law Dictionary* 1546 (9th ed. 2009)) (alterations in original). The court also explained that statutes of limitations are procedural in nature, while statutes of repose are "substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants," and that, with respect to statutes of repose, "'considerations of the economic best interests of the public as a whole' are at play." *Ibid.* (quoting *First United Methodist Church*, 882 F.2d at 866).

The panel majority recognized that the ten-year period at issue in this case "bars lawsuits 'brought after a specified time since the defendant acted,' without regard for the plaintiff's knowledge of his harm." Pet. App. 10a (quoting *Black's Law Dictionary* 1546). The court thus acknowledged that the provision is properly classified as a statute of repose. *Ibid.*

The majority concluded that Section 9658 is "ambiguous" as to whether it preempts statutes of repose, or operates only on statutes of limitations. Pet. App. 11a. The court noted that the federal statute repeatedly refers to statutes of limitations, but never refers to statutes of repose. *Id.* at 11a-12a. The court thus concluded that the language "could reasonably lead to a conclusion that its application is limited only to statutes of limitations." *Id.* at 12a.

The court, however, then discussed "an alternate reading" of the provision that would also encompass statutes of repose. Pet. App. 12a. It relied on the fact that the North Carolina statute of repose "is located with the statutes of limitations" in the North Carolina statute book, *ibid.*; that, in the court's view, the North Carolina statute of repose falls within the scope of the federal statute because it is "(1) a 'period,' (2) 'specified in a statute of limitations,' (3) 'during which a civil action . . . may be brought'" and thus "comports with the definition of 'applicable limitations period,'" *ibid.* (quoting 42 U.S.C. 9658(b)(2)); and that the statute of repose's "commencement date . . . is earlier than the federally required commencement date," *id.* at 12a-13a (quoting 42 U.S.C. 9658(a)(1)).

Having determined that the text of Section 9658 is ambiguous, the court of appeals concluded that it was required to adopt a "liberal construction" because CERCLA is a "remedial statute[]." Pet. App. 15a (internal quotation marks omitted). The court accordingly held "that the federally required commencement date in [Section] 9658 preempts North Carolina's ten-year limitation on the accrual of real property claims." *Id.* at 16a.

b. Judge Thacker dissented. Pet. App. 19a-36a. The dissent noted that statutes of limitations are procedural devices designed to limit remedies while statutes of repose are substantive provisions. *Id.* at 22a-23a. The two types of provisions, the dissent observed, also operate differently: "Statutes of limitations typically begin to run either on the date of the plaintiff's injury, or on the date the injury is first discovered or should have been discovered with reasonable diligence," *id.* at 22a, while "[s]tatutes of re-

pose typically begin to run after 'the occurrence of some event other than the injury which gave rise to the claim,'" *id.* at 23a (quoting *McDonald* v. *Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008), cert. denied, 557 U.S. 919 (2009)).

The dissent noted that North Carolina law creates both a three-year statute of limitations and a ten-year statute of repose. Pet. App. 26a-27a. "But only the three-year provision specifies a time period to bring a cause of action *after* the right has accrued by operation of the discovery rule." *Id.* at 27a. By contrast, "[t]he 10-year provision specifies a time restriction *regardless* of whether the right to bring the cause of action could have otherwise accrued." *Ibid.*

The dissent also noted that, textually, "any application [of Section 9658] to North Carolina's statute of repose is untenable." Pet. App. 28a. The federal statute is triggered if "the state 'commencement date' [is] 'earlier than the federally required commencement date,'" *ibid.* (quoting 42 U.S.C. 9658(a)(1)), and "the commencement date is defined as the *beginning* of the period in which a civil action may be brought," *id.* at 28a-29a (citing 42 U.S.C. 9658(b)(2)-(3)). "But the North Carolina statute of repose does not provide a beginning or 'commencement date' as that term is defined. Rather, it provides an outer limit, after which no cause of action may accrue." *Id.* at 29a. Accordingly, the dissent determined, Section 9658 "cannot graft neatly—or at all—onto the North Carolina statute of repose so as to preempt its enforcement." *Ibid.*

SUMMARY OF ARGUMENT

CERCLA's uniform federal discovery rule that triggers the start of state statute of limitations periods in tort suits involving hazardous substances has no effect on North Carolina's statute of repose.

A. The federal statute at issue here, 42 U.S.C. 9658, requires use of a discovery rule for statutes of limitations applicable to state tort cases involving exposure to hazardous substances. Thus, the period within which a cause of action may be brought does not begin to run before the plaintiff has had an opportunity to discover the injury and its connection to hazardous substances.

North Carolina has a three-year statute of limitations, and, under state law, that three-year period does not begin to run until the plaintiff has discovered the injury. Here, the discovery of the injury also revealed that the injury was caused by hazardous substances. Thus, without reference to CERCLA, the applicable limitations period did not begin to run here until respondents discovered that their land had been exposed to hazardous substances. The federal statute, which applies only when a State's applicable limitations period begins to run earlier than the date on which the plaintiff discovers the injury and its cause, thus has no application in this case.

The court of appeals mistakenly concluded that Section 9658 preempts North Carolina's statute of repose, which eliminates causes of action once ten years have elapsed after the defendant's last act or omission. Section 9658 applies only to "the applicable limitations period," which it defines as the "period specified in a statute of limitations during which a civil action * * * may be brought." 42 U.S.C.

9658(b)(2). North Carolina's statute of repose does not establish such a period. It begins to run on the date of the defendant's last relevant act or omission and without any consideration of the time of any injury to the plaintiff or the accrual of his cause of action. It is thus not the applicable period when a civil action "may be brought," *ibid.*, and is unaffected by Section 9658.

Had Congress intended to preempt state statutes of repose, it would not have done so by referring to the "period specified in a statute of limitations during which a civil action * * * may be brought." 42 U.S.C. 9658(b)(2). Moreover, adopting a uniform federal discovery rule (as is done in Section 9658) would not have been a sensible means to achieve the goal of displacing all other time periods, whether characterized as statutes of limitations or statutes of repose. Discovery rules are common in ordinary statutes of limitations, so Congress's choice to adopt a federal discovery rule in that context was not surprising. But discovery rules and statutes of repose are fundamentally inconsistent, and there is no reason to believe that Congress intended the novel step of forcing an awkward combination of the two.

B. The statutory context of Section 9658's enactment likewise supports the conclusion that it does not affect state statutes of repose. Congress legislated in response to a report suggesting *both* that States adopt a discovery rule for statutes of limitations and that they repeal their statutes of repose. Congress was thus expressly made aware that adoption of a discovery rule would not affect the operation of statutes of repose. Yet it decided to enact only a federally re-

quired discovery rule, and took no action with respect to state statutes of repose.

In making that distinction, Congress hewed to a recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability. The distinction is reflected in choice of law principles—under which a court follows the forum State's statute of limitations but a statute of repose from the State whose substantive law governs—and the FTCA—which has a federal statute of limitations but does not preempt state statutes of repose. Congress reasonably followed the same approach here, making only a tailored alteration to the States' procedural law related to tort actions involving hazardous substances, but not altering the substance of those actions.

C. Even if Section 9658 were considered unclear on the question whether it applies to a statute of repose, its structure and purpose suggest it should be construed against preemption on a matter of traditional state authority. The court of appeals ignored that principle, even though it thought the statute ambiguous. Instead, the court mistakenly relied on the canon that remedial statutes like CERCLA must be construed liberally.

The purpose of CERCLA is to promote cleanup of hazardous substances and to require responsible parties to bear the costs of that cleanup, not to advantage tort plaintiffs in all respects. Indeed, when Congress adopted Section 9658, it declined to adopt many measures that had been proposed to strengthen tort plaintiffs' ability to recover damages based on exposure to hazardous substances. In particular, Congress declined to create a new federal administrative reme-

dy, and it rejected all proposals to enact substantive changes to state tort law. Instead, Congress supplanted state procedural law in one narrow respect. That limited preemption should not be read to override States' separate substantive determinations, such as those embodied in statutes of repose, regarding the content of state-law causes of action.

ARGUMENT

THE FEDERAL DISCOVERY RULE IN SECTION 9658 HAS NO EFFECT ON NORTH CAROLINA'S STATUTE OF REPOSE

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, alters a State's statute of limitations governing state-law tort actions involving hazardous substances in one limited respect: It establishes a federal discovery rule for the commencement of the limitations period and requires its use if state law would provide for an earlier commencement date. That provision has no application to North Carolina's statute of repose, a substantive limit on liability determined exclusively by reference to the defendant's actions, not plaintiff's injury or ability to bring suit.

A. The Text And Structure Of Section 9658 Make Clear That It Has No Application To The Ten-Year Period At Issue Here

1. CERCLA creates an "[e]xception" to the commencement date of state statutes of limitations as applied to state-law suits involving hazardous substances. 42 U.S.C. 9658(a)(1). Its operative provision directs that

> if the applicable limitations period for such action (as specified in the State statute of limita-

> tions or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

Ibid. "[T]he statute of limitations established under State law shall apply" in all other respects. 42 U.S.C. 9658(a)(2).

The provision goes on to define the terms used in the exception it creates to operation of state statutes of limitations. See 42 U.S.C. 9658(b). It defines "the applicable limitations period" as "the period specified in a statute of limitations during which a civil action [relating to exposure to hazardous substances] may be brought." 42 U.S.C. 9658(b)(2). It defines "commencement date" as "the date specified in a statute of limitations as the beginning of the applicable limitations period." 42 U.S.C. 9658(b)(3). And it provides that the "federally required commencement date" generally means "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages * * * were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A).

Whether Section 9658(a)(1) applies in a given case turns on a comparison between the beginning of the period when a civil action "may be brought" under state law and the "federally required commencement date," 42 U.S.C. 9658(a)(1), (b)(2) and (3). If state law provides that such a period begins to run before the date the plaintiff knew (or reasonably should have known) that the property damage was caused by a hazardous substance, the federal commencement date

displaces state law. 42 U.S.C. 9658(b)(2), (3) and (4)(A). State law continues to govern in all other respects. 42 U.S.C. 9658(a)(2).

Under North Carolina law, a three-year statute of limitations specifies the period during which a civil action may be brought. N.C. Gen. Stat. § 1-52(16); see *id.* § 1-15(a) ("Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued."). That three-year period does not begin to run until "damage to [the plaintiff's] property becomes apparent or ought reasonably to have become apparent." *Id.* § 1-52(16). There is no dispute that North Carolina's three-year statute of limitations satisfies the definition of "the applicable limitations period" established by Section 9658. 42 U.S.C. 9658(a)(1). It is a "period specified in a statute of limitations during which a civil action [relating to exposure to hazardous substances] may be brought." 42 U.S.C. 9658(b)(2); see N.C. Gen. Stat. § 1-15(a).

Because North Carolina's three-year statute of limitations does not begin to run until "damage to [the plaintiff's] property becomes apparent or ought reasonably to have become apparent," N.C. Gen. Stat. § 1-52(16), the state-law commencement date here is the date respondents discovered that their wells were contaminated. The federal commencement date in this case would be the same: When respondents discovered the contamination, they also "knew * * * [that] the property damages * * * were caused * * * by the hazardous substance," 42 U.S.C. 9658(b)(4)(A). See Pet. App. 55a (Compl. para. 34). Accordingly, Section 9658, which applies only when "the applicable [state] limitations period * * *

provides a commencement date which is earlier than the federally required commencement date," 42 U.S.C. 9658(a)(1), has no application to North Carolina's three-year statute of limitations as applied here.[2]

2. The court of appeals believed that Section 9658 was "ambiguous" on the question whether it preempted North Carolina's ten-year statute of repose, and the court ultimately answered that question affirmatively. Pet. App. 11a; see *id.* at 14a-16a. The court was incorrect in its finding of ambiguity and in its ultimate conclusion.

a. As noted above, Congress defined "the applicable limitations period" relevant to Section 9658 as the "period specified in a statute of limitations during which a civil action * * * may be brought," 42 U.S.C. 9658(b)(2), and the "commencement date" as the start of that period, 42 U.S.C. 9658(b)(3). Section 9658 thus addresses the starting point of the period during which "the plaintiff can file suit and obtain relief," *i.e.*, the point at which he first has "a complete

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[2] Under different circumstances, the commencement date for the North Carolina statute of limitations might be superseded by Section 9658. North Carolina law incorporates a traditional discovery rule, providing that the statute of limitations period begins to run when "bodily harm" or "physical damage * * * becomes apparent or ought reasonably to have become apparent." N.C. Gen. Stat. § 1-52(16). By contrast, the federal provision includes an "enhanced discovery rule" (Pet. App. 21a & n.1 (Thacker, J., dissenting)) because it adds an element involving knowledge of causation: the federal commencement date is the point at which "the plaintiff knew (or reasonably should have known) that the personal injury or property damages * * * were caused or contributed to by the hazardous substance." 42 U.S.C. 9658(b)(4)(A). This difference between the two discovery rules is not implicated here.

and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997) (*Bay Area Laundry*) (citation omitted).

The statute of repose in N.C. Gen. Stat. § 1-52(16) is not that period. The ten-year period commences on the date of "the last act or omission of the defendant giving rise to the cause of action," *ibid.*, regardless whether the cause of action actually exists at that time. *McDonald* v. *Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008) (A statute of repose "does not require injury before it operates."), cert. denied, 557 U.S. 919 (2009). The ten-year period thus runs without any reference to when a plaintiff's action may be filed: A defendant's last act or omission may precede the plaintiff's injury, and a plaintiff typically may not initiate a civil action before suffering an injury. *Bay Area Laundry*, 522 U.S. at 200-201 (contention that an ordinary statute of "limitations period commences at a time when the [plaintiff] could not yet file suit" is "inconsistent with basic limitations principles"); see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 418-419 (2005) (discussing "the default rule that Congress generally drafts statutes of limitations to begin when the cause of action accrues"); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 165 (5th ed. 1984) (*Prosser and Keeton*) ("It follows that the statute of limitations is generally held not to begin to run against a negligence action until some damage has occurred."); see also *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610-611 (2013) (discussing default rule but noting that Congress can make exceptions to it).

North Carolina courts have interpreted provisions like the ten-year limit in N.C. Gen. Stat. § 1-52(16) as "unyielding and absolute barrier[s] that prevent[] a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce." *Black* v. *Littlejohn*, 325 S.E.2d 469, 475 (N.C. 1985). Such a provision, which the North Carolina Supreme Court has termed a "period of repose," *id.* at 474, is thus not a "period * * * during which a civil action * * * may be brought." 42 U.S.C. 9658(b)(2); see Pet. App. 29a (Thacker, J., dissenting) (Section 9658 "cannot graft neatly—or at all—onto the North Carolina statute of repose," which "does not provide a beginning or 'commencement date' as that term is defined."). It is accordingly not an "applicable limitations period" (42 U.S.C. 9658(a)(1)) affected by Section 9658.

In this case, for example, the complaint alleges that respondents first learned of the contamination in 2009, Pet. App 55a (Compl. para. 34), and they filed suit in 2011, *id.* at 9a. Because North Carolina has a discovery rule, respondents' action was timely filed under the three-year statute of limitations. The barrier to respondents' cause of action is not the commencement date of the period during which a civil action could be brought—the matter addressed by 42 U.S.C. 9658. Instead, it is the operation of the statute of repose that substantively extinguished their cause of action.

b. The court of appeals did not explain how the ten-year period in the statute of repose could be understood as the period during which a civil action could be brought for purposes of Section 9658. Instead, the court simply stated that the statute of re-

pose was categorically "preempted." Pet. App. 18a. That approach was misconceived.

Congress did not "preempt" any state time limitations in their entirety, but rather *modified* certain state limitations periods by prohibiting them from beginning to run until the plaintiff could discover both the injury and its cause. That choice makes perfect sense in the context of ordinary state statutes of limitations, most of which already embodied discovery rules in one form or another at the time Congress enacted Section 9658. *Study Group Report*, Pt. 2, at B-1; *Prosser and Keeton* § 30, at 166-167. Congress's limited intent was thus to address tort claims in those States that had not adopted the majority rule, and to ensure that all States had a discovery rule that delayed accrual not only until the discovery of the injury, but also until the connection to hazardous substances could reasonably have been discovered, see n.2, *supra*.

By contrast, if Congress intended also to preempt state statutes of repose, which can begin to run before a plaintiff is even injured, it would not have sensibly done so by layering a discovery rule on top of those provisions. Repose periods are usually much longer than traditional limitations periods—here, ten years as opposed to three—and a discovery rule would render them entirely redundant with the shorter period. Indeed, a statute of repose triggered by a plaintiff's discovery of his injury would not be a statute of repose at all; by its nature, the period begins to run based on the defendant's actions alone.

This Court's discussion in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) (*Lampf*), of the limitations periods under the securi-

ties laws is illustrative of this point. As a general matter, those limitations periods are "one year after discovery and * * * three years after violation." *Id.* at 355 n.2. The Court in *Lampf* declined to apply "the doctrine of equitable tolling" to the three-year period, explaining that such tolling is "fundamentally inconsistent" with the purpose of that provision to "impose an outside limit" on substantive liability and to "serve as a cutoff." *Id.* at 363 (citation omitted). Imposing a discovery rule on a state statute of repose would be "fundamentally inconsistent" (*ibid.*) with such a time limit for the same reason.

c. Given these textual manifestations of Congress's limited intent, Section 9658 contrasts markedly with other statutes in which Congress chose to override *all* otherwise applicable time limitations.

In one set of such statutes, Congress created a new, exclusive time limitation applicable to claims brought by specified federal agencies as conservator, receiver, or liquidating agent for failed financial institutions. Courts of appeals have correctly construed such limitations periods to apply to the exclusion of any other time limitation that might otherwise apply. See *National Credit Union Admin. Bd.* v. *Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1254-1267 (10th Cir. 2013) (construing 12 U.S.C. 1787(b)(14)), petition for cert. pending, No. 13-576 (filed Nov. 8, 2013); *Federal Hous. Fin. Agency* v. *UBS Ams. Inc.*, 712 F.3d 136, 141-144 (2d Cir.) (construing 12 U.S.C. 4617(b)(12)), motion for leave to intervene and file a pet. for writ of cert. denied, 134 S. Ct. 372 (2013); see also *Beckley Capital Ltd. P'ship* v. *DiGeronimo*, 184 F.3d 52, 57 (1st Cir. 1999) (construing 12 U.S.C. 1821(d)(14)). The text, context, and history of those

provisions make clear that Congress intended an exclusive, uniform time limitation to apply to actions brought by the designated federal agencies. *E.g.*, *UBS Ams.*, 712 F.3d at 141 (noting that 12 U.S.C. 4617(b)(12) "sets forth '*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver'") (quoting 12 U.S.C. 4617(b)(12)(A) (emphasis and alteration in original).

Here, by contrast, Congress did not enact a new time limitation to supersede all others. Instead, Congress altered particular preexisting state statutes of limitations in only one limited respect—by changing the date on which the cause of action accrued. Congress otherwise left time limitations unchanged, explicitly stating that those time limitations continue to apply "[e]xcept" to the extent that they are specifically superseded by federal law. 42 U.S.C. 9658(a)(2).

3. The court of appeals thought it significant that the term "statute of limitations," which repeatedly appears in 42 U.S.C. 9658, has been used in some contexts to refer to provisions that contain time limitations that may be described as statutes of repose. Pet. App. 13a. The Securities Act, for example, contains a provision that precludes lawsuits brought more than one year after the violation could reasonably have been discovered, or more than three years after the violation, 15 U.S.C. 77m; see pp. 21-22, *supra*, and this Court has described this provision in its entirety as a "statute of limitations." *E.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976); see Pet. App. 12a (noting that the ten-year period at issue here appears in a state enactment, N.C. Gen. Stat. § 1-52(16), that may be described as a statute of limitations).

But the term "statute of limitations" has also been used in a more precise sense, to describe only those time limitations that bar "causes of action * * * unless brought within a specified period of time after the right accrued." *Black's Law Dictionary* 835 (5th ed. 1979), quoted in Pet. App. 24a-25a; see Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 584 (1981) (describing statutes of repose as "distinct from a statute of limitation because [they] begin[] to run at a time unrelated to the traditional accrual of the cause of action"); *Bolick* v. *American Barmag Corp.*, 293 S.E.2d 415, 419 n.4 (N.C. 1982) ("Because [the statute] attempts to bar absolutely claims * * * after a period measured from a date *other than* the date of accrual of those claims, it does not constitute a statute of limitation.") (internal quotation marks omitted).

In the context of Section 9658, the only purpose of which is to alter the date on which causes of action first accrue, the term "statute of limitations" is most naturally read to mean a time limitation that precludes actions that are not "brought within a specified period of time after the right accrued." *Black's Law Dictionary* 835. But regardless of whether the term "statute of limitations" is given a broad or narrow reading, as discussed above, the mechanism by which 42 U.S.C. 9658 operates has no effect on the ten-year period at issue in this case.[3]

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[3] The use of the term "statute of limitations" likewise did not control the outcome in the cases in which Congress created a new, exclusive time limitation applicable to particular categories of claims. See pp. 22-23, *supra*. In that context, the term "statute of limitations" "refers to the time limits in [the new timing provision]

B. The Statutory Context Confirms That Congress Meant Only To Create A Discovery Rule And Not To Preempt Statutes Of Repose

Although the text and structure of Section 9658 answer the question presented in this case, the larger statutory context reinforces that conclusion.

1. The *Study Group Report* that preceded Congress's enactment of Section 9658 drew a distinction between altering the accrual date of a statute of limitations and eliminating a statute of repose. That report recommended "that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause." *Study Group Report* 241. Rather than waiting for States to act, Congress in Section 9658 responded to that recommendation by prohibiting state-law actions from accruing, for statute-of-limitations purposes, before "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages * * * were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. 9658(b)(4)(A).

The *Study Group Report* also recommended (at 241) "the repeal of the statutes of repose, which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." The Study Group's separate suggestion to *repeal* statutes of repose was necessary because the creation of a discovery rule of accrual would not itself affect the operation of such statutes.

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itself * * * not the time limits in other statutes that [the provision] replaces," and it supplants all other limitations periods. *Nomura*, 727 F.3d at 1257.

Congress took no action based on that recommendation concerning statutes of repose.

The Study Group's analysis of the North Carolina law at issue here confirms the distinction that was before Congress at the time it enacted Section 9658. An appendix to its report separated the States into four categories: (1) those "that have adopted the discovery rule by statute"; (2) those "that have achieved a similar result by case law interpretation"; (3) those that "have rejected the discovery rule"; and (4) those that "have not clearly committed themselves to either rule." *Study Group Report*, Pt. 2 at B-6.[4] The report placed North Carolina in the first category, recognizing that the State had already adopted a "discovery rule." *Id.* at B-9 to B-10; see *id.* at B-3 to B-4 (discussing North Carolina's formulation of the discovery rule); see also *id.* at B-63; *Study Group Report* 29.

The report also noted that North Carolina had a statute of repose. *Study Group Report*, Pt. 2, at B-9 to B-10, B-63. But the existence of the statute of repose did not cause the report's authors to put North Carolina in a different category or otherwise distinguish the State from other jurisdictions that had already adopted discovery rules for their statutes of limitations. The appendix thus confirms, in the specific context of the North Carolina statute at issue in this case, the point made elsewhere in the *Study Group*

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[4] The fact that discovery rules were sometimes created by "case law interpretation" explains the reference in 42 U.S.C. 9658 to limitations periods specified by "common law." 42 U.S.C. 9658(a)(1). Contrary to the panel majority's reasoning, Pet. App. 13a-14a, neither Congress's reference to common law in the operative provision of 42 U.S.C. 9658 nor its decision not to repeat the phrase in the definitional sections creates any ambiguity relevant to this case.

Report: Even if a State had a discovery rule (whether imposed by state law or superseding federal law), additional action would be needed to repeal the State's statute of repose. Congress took no such action.

2. Because "[t]he distinction between statutes of limitations and statutes of repose corresponds to the distinction between procedural and substantive laws," *Goad* v. *Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987), cert. denied, 487 U.S. 1218 (1988), it is unsurprising that Congress drew a line between them when deciding how much state law to preempt. As reflected in the title of the amendment, Congress decided to adopt only a limited "procedural reform," Pub. L. No. 99-499, § 203, 100 Stat. 1695 (capitalization altered), while leaving to the States the substantive question of whether a given plaintiff would be able to recover.

As the North Carolina Supreme Court has explained, "[o]rdinary statutes of limitations are clearly procedural, affecting only the remedy directly and not the right to recover." *Boudreau* v. *Baughman*, 368 S.E.2d 849, 857 (1988). "The statute of repose, on the other hand, acts as a condition precedent to the action itself." *Ibid.* "Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized." *Ibid.* For those reasons, the statute of repose is "a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." *Ibid.*; see Pet. App. 10a.

In drawing this same distinction in Section 9658, Congress followed a familiar approach also used in other areas of law. Under traditional choice-of-law rules, for example, state courts routinely apply their

own statutes of limitations to claims arising under the laws of other States. See *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722 (1988) (noting that "[t]his Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different state"); 63B Am. Jur. 2d *Products Liability* § 1417 (2010). At the same time, however, a state court generally applies the statute of repose of the State whose law provides the substantive rule of decision in a case. *E.g.*, *Boudreau*, 368 S.E.2d at 857 (adopting that rule and noting that the "overwhelming weight of authority in other jurisdictions accepts the characterization of statutes of repose as substantive provisions in a choice of law context"); *Wayne* v. *Tennessee Valley Auth.*, 730 F.2d 392, 400-402 (5th Cir. 1984), cert. denied, 469 U.S. 1159 (1985); Restatement (Second) of Conflict of Laws § 143 (1971); *Products Liability* § 1418. That is because statutes of limitations, as procedural rules, "express the public policy of the forum State in granting or denying access to its courts." *Goad*, 831 F.2d at 511. Statutes of repose, by contrast, are substantive laws that "reflect a State's determination of the proper relationship between the people and property within its boundaries." *Ibid.*

Likewise, the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, draws a distinction between a statute of limitations and a statute of repose. *Anderson* v. *United States*, 669 F.3d 161, 164-165 (4th Cir. 2011). The FTCA establishes a generally applicable federal statute of limitations, requiring claims to be "presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b).

By contrast, because the *substantive* restrictions on liability under state law apply to FTCA actions against the United States, 28 U.S.C. 1346(b), 2674, a State's statute of repose applies in such actions and is not preempted by the FTCA. *Anderson*, 669 F.3d at 164-165 ("Because statutes of repose are substantive limitations on liability, an FTCA claim does not lie against the United States where a statute of repose would bar the action if brought against a private person in state court."); see *Augutis* v. *United States*, 732 F.3d 749, 753-754 (7th Cir. 2013); see also *Huddleston* v. *United States*, 485 Fed. Appx. 744, 746 (6th Cir. 2012), cert. denied, 133 S. Ct. 859 (2013); *Smith* v. *United States*, 430 Fed. Appx. 246, 247 (5th Cir. 2011). But see, *e.g.*, *Jones* v. *United States*, 789 F. Supp. 2d 883, 892 (M.D. Tenn. 2011).

C. Other Features Of The Statute Confirm That Section 9658 Does Not Preempt Statutes Of Repose

Even if Section 9658 were thought to be ambiguous, the statute should not be interpreted to preempt the ten-year limitation at issue here. In various contexts, this Court has assumed "that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc.* v. *Good*, 555 U.S. 70, 77 (2008) (citation omitted) (first set of brackets in original). "[T]he ability of a state to create a substantive right to be free from liability under its own state tort law is unquestionably a traditional field of state regulation." Pet. App. 35a (Thacker, J., dissenting).

Regardless of how that assumption might apply in other contexts, here Section 9658 itself embodies essentially the same principle. See generally *Chad-*

bourne & Parke LLP v. *Troice*, No. 12-79, Slip op. 13-14 (Feb. 26, 2014) (construing statute not to preempt state law in light of other provisions showing that Congress had "purposefully maintain[ed] state legal authority, especially over matters that are primarily of state concern"). Section 9658 leaves the entire body of state tort law, both procedural and substantive, untouched, except for the commencement date for state statutes of limitations (and, even there, supplants them only if the commencement date is earlier than that provided by federal law). 42 U.S.C. 9658(a)(1). In doing so, Congress expressly emphasized that "[e]xcept" as provided by the federal discovery rule provision, "the statute of limitations established under State law shall apply" in tort actions involving hazardous substances. 42 U.S.C. 9658(a)(2). The careful attention Congress paid to *not* preempting state law, except in one narrow respect, makes it proper to resolve any ambiguity in Section 9658 against preemption.[5]

The panel majority failed entirely to address this principle, even after concluding that the federal statute was "ambiguous," Pet. App. 11a. Instead, the court of appeals resolved the perceived ambiguity in light of its more general view that "Congress's purpose in enacting CERCLA was remedial." *Id.* at 14a. The court's interpretive approach ignores the nature

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[5] By contrast, where a federal agency is a plaintiff acting pursuant to Congressional command, *e.g.*, pp. 22-23, *supra*, any ostensible ambiguity in a statute is resolved by the well-established interpretative rule that "statutes of limitations are construed narrowly against the government," which "is given the benefit of the doubt if the scope of the statute is ambiguous." *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006).

of the specific provision at issue and the manner in which it fits into the statute as a whole.

The overriding purpose of CERCLA is "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co.* v. *United States*, 556 U.S. 599, 602 (2009) (internal quotation marks and citation omitted). To that end, "CERCLA imposes strict liability for environmental contamination upon four broad classes of [potentially responsible parties]." *Id.* at 608 (citing 42 U.S.C. 9607(a)). "Once an entity is identified as [a potentially responsible party], it may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs." *Id.* at 609. CERCLA provides a further incentive for entities to assume responsibility by prohibiting responsible parties from seeking contribution from other entities that have settled their liability with a State or with the federal government. 42 U.S.C. 9613(f)(2).

It is well established that CERCLA is a remedial statute in its various provisions for the cleanup of sites contaminated by hazardous substances. *E.g.*, *Niagara Mohawk Power Corp.* v. *Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010) ("CERCLA, remedial in nature, is designed to encourage prompt and effective cleanup of hazardous waste sites."). Indeed, under certain circumstances, CERCLA itself allows private parties that have incurred costs "associated with cleaning up contaminated sites" to "recover expenses" from responsible parties. *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 131 (2007) (citing 42 U.S.C. 9607(a), 9613(f)); see 42 U.S.C.

9613(g)(2)-(3) (providing periods in which such actions must be commenced); see also 42 U.S.C. 9658(a)(3) (stating that nothing in Section 9658 "shall apply with respect to any cause of action brought under [S]ection 9607").

But it does not follow that helping private plaintiffs to collect tort damages years after the contamination has ended—and after the point at which the state legislature determined as a substantive matter that liability under state law should cease—fits into that same federal remedial focus of the Act. Cf. 131 Cong. Rec. 35,646 (1985) (statement of Rep. Kindness) (opposing creation of federal cause of action under CERCLA for tort damages related to hazardous substances because such a cause of action "ha[d] to do with adjustment of private rights and liabilities and remedies" and was thus "at odds" with purpose of CERCLA "to clean up hazardous waste sites in order to protect the public interest"); 131 Cong. Rec. 35,639 (statement of Rep. Glickman) (explaining that CERCLA's "real purpose * * * is the cleanup of hazardous waste sites" and that a new federal tort remedy would improperly turn CERCLA "into a private compensation program"); 131 Cong Rec. 35,640 (statement of Rep. Fish) ("The purpose of the Superfund law is to provide a Federal response to the urgent need to clean up existing hazardous waste sites. * * * This House has consistently rejected expanding the Superfund statute to deal with legal rights aimed at compensation for damages.").

The conclusion that CERCLA's specific remedial focus on cleanup does not extend to damages recoveries for private tort plaintiffs under state law is underscored by the absence of any provision relevant to

such tort actions in CERCLA as originally enacted in 1980. Instead, Congress commissioned the *Study Group Report* to address the distinct subject of the adequacy of tort remedies for those harmed by hazardous substances. 42 U.S.C. 9651(e). And when Congress later amended CERCLA in response to that report, it acted on only one of the Study Group's recommendations—that involving the discovery rule—while declining to adopt (and thereby implicitly rejecting) all the others, including the elimination of state statutes of repose. See pp. 4-6, *supra* (discussing Congress's failure to adopt a federal administrative scheme or to preempt state law on joinder, joint and several liability, and causation in state tort actions).

Congress opted against adopting the *Study Group Report's* other recommendations, even though that report's authors thought those recommendations (including repeal of statutes of repose) were necessary to "remove unreasonable procedural and other barriers to recovery in court action for personal injuries resulting from exposure to hazardous waste." *Study Group Report* 240; see pp. 4-6, *supra*. That choice demonstrates, as the express preservation of state law in 42 U.S.C. 9658(a)(2) confirms, that Congress's goal was not exclusively to provide remedies for plaintiffs at the expense of all other interests. *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010) ("[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations.") (citation omitted). Instead, Section 9658 represents a careful "balance between harmonizing certain procedural matters in toxic tort cases and allowing states to con-

tinue to regulate in their own substantive areas of law." Pet. App. 34a-35a (Thacker, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 42 U.S.C. 9658 provides:

Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions

As used in this section—

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by

the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

2. N.C. Gen. Stat. § 1-15(a) (2011) provides:

Statute runs from accrual of action.

Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

3. N.C. Gen. Stat. § 1-52(16) (2011) provides in pertinent part:

Three years.

Within three years an action—

* * * * *

Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR - 3 2014
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No. 13-339

In The Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN COATINGS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE PRECISION MACHINED PRODUCTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the preemption provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9658, applies to state statutes of repose in addition to state statutes of limitations.

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INTEREST OF *AMICI CURIAE*

Amici trade associations represent a vast array of businesses and industries whose success depends on the stability provided by the rule of law. *Amici*'s members invest heavily in the economy and generate employment and growth for their local communities and throughout the Nation. *Amici* and their members have an interest in the outcome of this case because state statutes of repose play an important role in providing the stability and predictability necessary to foster economic growth and opportunity.[1]

The **American Chemistry Council** (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $770 billion enterprise and a key element of the nation's economy. It is one of the

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

nation's largest exporters, accounting for 12 percent of all U.S. exports.

The **American Coatings Association, Inc.** (ACA) is a non-profit trade association representing some 300 members who manufacture, supply, and distribute paint and coatings products and their applications. Many members have been involved since its passage in CERCLA enforcement and contribution actions, and the association has been engaged historically in advocacy that has resulted in streamlining the law's key provisions and their administrative implementation to help improve its fairness and efficiency in furtherance of its objectives.

The **American Petroleum Institute** (API) is a national trade association representing over 550 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API's members support more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, those members have invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternative sources. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers.

The **National Association of Manufacturers** (NAM) is the largest manufacturing association in

the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **Precision Machined Products Association** (PMPA) is a national trade association representing over 440 member companies involved in the production of highly engineered, precision machined components used in advanced automotive, aerospace, electrical, construction, and medical technologies. PMPA's members include metal producers, machining and manufacturing companies, machine tool builders, and producers of tooling, accessories, and metalworking fluids. The precision machining industry is best described by NAICS code 332721, and accounts for over 78,070 jobs with payrolls of $3.6 billion and shipments of over $13.3 billion. The mission of the PMPA is to provide the information, resources and networking opportunities to advance and sustain its members while advocating for manufacturing throughout the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

By failing to appreciate the difference between statutes of repose and statutes of limitation, the court of appeals impermissibly expanded the plain text of 42 U.S.C. § 9658 (CERCLA § 309) to preempt state statutes of repose in addition to statutes of limitation. Properly understood, statutes of repose do not cut off the remedy as a statute of limitation does. Statutes of repose abolish the cause of action altogether. *Burlington N. & Santa Fe Ry. Co.* v. *Poole Chem. Co.*, 419 F.3d 355, 363 (5th Cir. 2005). This means that instead of being procedural rules, statutes of repose are substantive laws. See Pet. Br. 21-22 (explaining that statutes of limitations are "procedural, in that they are designed to encourage litigants to assert their rights promptly," while statutes of repose "demarcate the existence of tort liability" and thus are substantive). The panel majority's overbroad reading of CERCLA thus unwittingly created a situation in which Congress is effectively dictating to the states the content of their substantive laws.

That error is magnified when one considers the history and purpose of statutes of repose. As to history, during the 1950s and 1960s, tort liability was dramatically expanded through a variety of mechanisms, including the discovery rule, the imposition of strict liability, and the abandonment of privity requirements. See Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 587 (1981);

Dean Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791-99 (1966). In the wake of those changes—which exponentially increased tort liability across the board—virtually all states enacted one or more statutes of repose to restore at least a measure of finality and predictability as to potential liabilities. McGovern, *supra* at 580; Andrew R. Turner, *The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability*, 46 J. AIR L. & COM. 449, 455 (1981). Finality and predictability, in turn, are crucial to states' efforts to expand their economies and provide employment opportunities to their citizens by creating a legal environment in which businesses can flourish.

As to purpose, statutes of repose have been instrumental in states' efforts to create, enhance, and protect their citizens' economic opportunities. States across the Nation have enacted them as part of broader efforts to strengthen their economies—an effort that is all the more important in the current economic environment. Each repose statute represents a policy choice by that state about the balance it wishes to strike among a variety of competing public policy goals. Congress had sound reasons not to disturb those policy choices.

To begin, statutes of repose serve to reinforce the tort law theories under which we normally hold actors liable. Although the primary goal of the law in this area is to promote reasonable conduct, perpetual liability creates situations where companies would be

incentivized to act unreasonably in an attempt to avoid liability. Manufacturers might decide not to make useful products altogether or they might be deterred from making safety modifications to products that could later be used as evidence in a tort suit for a heightened standard of care. Statutes of repose help avoid that unfortunate result. And states also use the statutes to limit stale claims, promote judicial economy, and help control insurance costs (another area of state power). Repose statutes thus provide a measure of certainty for the public in administering commercial transactions.

What is more, the court of appeals' departure from the plain text of CERCLA § 309 has the potential for much unintended mischief. Given its apparent applicability to much garden-variety private tort litigation, Section 309 could preserve lawsuits in any area—even far outside the environmental context—that happen to involve anything that could be considered a "hazardous substance" under CERCLA. This accidental abolition of state statutes of repose would alter state substantive law and destroy the balance struck by many states to help ensure economic opportunity and employment for their citizens. Congress did not intend that result, and the plain text of § 309 prohibits it. The decision of the court of appeals should be reversed.

ARGUMENT

If the court of appeals' decision is permitted to stand, businesses will not be able to rely on the traditional statutes of repose offered under state law to defend against a wide range of tort claims. The Court should reject that result for several reasons.

I. The History And Purpose Of Statutes Of Repose Confirm That Unlike Statutes Of Limitation, They Are Substantive Laws, Not Procedural Rules

Statutes of repose represent important policy choices made by states. They were passed to counteract the effects of changes in law, such as the discovery rule, that would otherwise create perpetual liability. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). The history and purpose of statutes of repose confirm they are substantive tort laws, not procedural rules—and thus very different from the statutes of limitation expressly preempted by CERCLA § 309.

Statutes of repose are an important part of state tort law because they ensure that designers and manufacturers do not face perverse disincentives to market or improve their products. This makes repose statutes just as much a substantive component of a state's tort law as the standard of proof that a plaintiff must adduce at trial to show liability.

A. Like Other Substantive Components Of State Tort Law, Statutes Of Repose Help Ensure That Designers And Manufacturers Can Operate In A Manner That A State Deems Reasonable

Although CERCLA is a strict-liability statute, the tort suits brought by individuals based on exposure to "hazardous substances" are typically actions sounding in nuisance or negligence. Statutes of repose are an indispensable aspect of this system that seeks to promote reasonable conduct.

Tort law encourages actors to conduct their affairs in a reasonable manner—and the legal system assigns fault when actors fail to do so. Fault can only be assigned, however, if one party owes a duty to another. *Palsgraf* v. *Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928). And so while "the manufacturer of [a] thing of danger is under a duty to make it carefully," *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916), the law limits liability where reasonable steps are taken by the manufacturer to ensure safety.

Statutes of repose reinforce this system. For example, "[t]he underlying theory of a statute of repose posits that after a reasonable period of operating without injury or accident, the law deems a product carefully designed and manufactured." James F. Rodriguez, Note, *Tort Reform & GARA: Is Repose Incompatible with Safety?*, 47 ARIZ. L. REV. 577, 581 (2005) (emphasis omitted). Thus if a product does not

cause injury during the period before repose, it will have met the state's conditions for reasonableness. *Ibid.*

Without statutes of repose, however, perpetual liability would threaten to seriously undermine a state's tort regime. For one thing, manufacturers could be disincentivized from making safer and more efficient products. Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 633 (1985). Changes to products constantly update the standard of care with which a manufacturer must act. Without repose, the threat of a plaintiff offering evidence of design changes against the maker could discourage innovation—especially with regard to safety. *Ibid.*

The threat of perpetual liability could also lead to over-deterrence. Consider the cost-benefit analysis that always takes place in a product's design and manufacturing stage as well as in the governance of its operations (i.e., why we do not force car manufacturers to limit vehicle engines to 25 or 50 horsepower and thus eliminate fatal high-speed accidents completely). States fold these policy considerations directly into their substantive tort law.

Absent a statute of repose, however, there might be a product or activity that a state finds particularly useful but that companies facing perpetual liability are simply unable or unwilling to make. Or perhaps the long-term insurance costs might cause a manufacturer to spend more resources in developing a product than is optimal for the state's goals. For example,

states do not want architects calling for titanium walls in houses just to make sure they never collapse from termites. Such over-deterrence drives away businesses and citizens alike.

This reasoning was behind the support for statutes of repose that followed expansion of tort liability in the 1950s and 1960s. In particular, the discovery rule—a statute of limitations does not begin running until an injury is or should have been discovered—exposed manufacturers to virtually open-ended liability. Turner, *supra*, at 456. This made statutes of limitation procedural rather than substantive because it focused on the individual's diligent prosecution of an injury. To counter that, many states passed statutes of repose and the U.S. Department of Commerce even promulgated a model uniform act containing such a statute. *Id.* at 456-57 (citing UPLA, § 110(b), 44 Fed. Reg. 62,732 (1979)).

Statutes of repose thus play an important role in state tort law by allowing designers and manufacturers to act in a manner that the state deems reasonable. These statutes are just as much a substantive component of a state's tort law as the standard of proof that a plaintiff must adduce at trial to show liability—further illustrating why Congress would not have intruded into this area.

B. Other Salutary Purposes Served By Statutes Of Repose Further Confirm The Important Role They Play In Substantive State Tort Law

Besides reinforcing the reasonableness determination traditionally left to the states, statutes of repose provide other benefits that further demonstrate why they are substantive, not procedural (and thus very different from the statutes of limitation expressly preempted by § 309). See *Sch. Bd. of City of Norfolk* v. *U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) ("[A statute of repose] is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." (citation and internal quotation marks omitted)).

First, states achieve the public good of certainty and finality in the administration of commercial transactions through repose statutes. States have long recognized the need to protect sources of jobs and tax revenue from protracted and extended vulnerability to lawsuits. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 54 A.3d 1005, 1024 (Conn. 2012) ("[S]tatutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." (citation and internal quotation marks omitted)).

Second, statutes of repose promote judicial economy. They affect not only the sheer number of cases

that state courts must hear, but also the quality of those cases, by impeding stale claims where it may be difficult for a business to defend (or a plaintiff to prosecute) because of lost records or faded memories. *Craven* v. *Lowndes Cnty. Hosp. Auth.*, 437 S.E.2d 308, 310 (Ga. 1993) (concluding that statutes of repose serve a legitimate state interest in protecting against stale claims). Judicial efficiency is undermined when those obstacles are removed and stale claims are facilitated.

Statutes of repose further improve judicial economy by focusing plaintiffs on the liable parties and not on original manufacturers who may be innocent regarding the injury (but are perhaps perceived as having "deep pockets" for recovery purposes). One example can be found in the aircraft industry. "NTSB data indicates any aircraft accident is far more likely to be due to pilot error, weather, or a maintenance problem than a design defect." Rodriguez, *supra*, at 598 (citing H.R. Rep. No. 103-525(I), at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638 ("NTSB data shows only 1% of general aviation accidents are caused by design or manufacturing defects.")). The cases seem to indicate, though, that manufacturers are more likely to be the primary target in a lawsuit. *Id.* at 597-98. A statute of repose, however, can prevent the needless waste of time and judicial resources spent on fishing expeditions or *in terrorem* settlement attempts. See, e.g., *Eastin* v. *Broomfield*, 570 P.2d 744, 751 (Ariz. 1977) (holding that segregating meritorious claims from frivolous ones is a legitimate

state interest); *Renner* v. *Edwards*, 475 P.2d 530, 532 (Idaho 1969) (noting that statutes of repose are designed to promote stability and prevent fraudulent claims).

Third, states use statutes of repose to lower insurance rates—another traditional area of state interest. The statutes can "help control runaway insurance costs" because, "[i]n the absence of statutes of repose, insurers must maintain reserves to cover potential claims for several years, if not decades, into the future." *Sun Valley Water Beds of Utah, Inc.* v. *Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989); see also *Harlfinger* v. *Martin*, 754 N.E.2d 63, 69 (Mass. 2001) ("The statute of repose at issue here was passed as part of a larger, long-term effort to curb the cost of medical malpractice insurance and keep such insurance available and affordable."); Charlotte E. Thomas, Note, *People Who Live in Glass Houses Should Not Build in Vermont: The Need for a Statute of Limitations for Architects*, 9 VT. L. REV. 101, 130 (1984) (discussing insurance problems facing architects in particular).

As insurance rates go up, businesses produce less taxable income and are unable to invest as heavily in the economy. See *Kenyon* v. *Hammer*, 688 P.2d 961, 976 (Ariz. 1984). There may also be long-term effects on families' decisions to stay in one locale over another because insurance costs are passed on to consumers in the form of higher prices and can drive away potential residents for that reason. See G. SULLIVAN, PRODUCTS LIABILITY: WHO NEEDS IT? 16 (1979). Repose statutes, on the other hand, lead to more stability in

this area "and thus provide greater actuarial precision in setting insurance rates." Hicks, *supra*, at 632-33. This, in turn, "facilitate[s] efficient business planning and ultimately benefit[s] businessmen, professionals, consumers, and the economy." *Ibid.*

In sum, repose statutes are vehicles for a state to achieve various policy objectives in its substantive law by cutting off various categories of potential claims. At present, virtually every state has enacted at least one statute of repose, and some have adopted several for different categories of potential claims. See Francis P. Manchisi & Lorraine E.J. Gallagher, *A nationwide survey of statutes of repose*, http://www.wilsonelser.com/files/repository/NatlSurveyRepose_March2006.pdf.

These experiments in the laboratories of the states are exactly what Madison and the Framers envisioned. See James Madison to the Members of the First Congress, 2 Annals of Cong. 1897 (1791) ("Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it * * * * *"). Within their realms of sovereignty, states control what is and is not a tort. Congress did not override that prerogative here, as the text of § 309 makes plain.

II. If Permitted To Stand, The Court Of Appeals' Construction Of CERCLA § 309 Will Have Serious Unintended Consequences For A Wide Range Of Tort Litigation

Section 309 applies to a vast range of state tort actions because CERCLA's definition of "hazardous substance" is extremely broad. 42 U.S.C. § 9601(14). That definition includes hundreds of substances that EPA has regulated under other environmental statutes. Even common household items such as copper, nickel, and ammonia are classified by law as CERCLA "hazardous substances" because EPA regulates them in certain situations under the Clean Water Act. 40 C.F.R. § 302.4 (2012). Moreover, these materials are CERCLA "hazardous substances" at all times and in all places, regardless of their quantity, concentration, bioavailability (i.e., the ease with which it can make its way through the environment), or any other actual properties. Status as a CERCLA "hazardous substance" thus does not reflect the reality of how a substance is present at any particular time or place.

For example, EPA regulates effluent discharges containing copper under the Clean Water Act out of concerns about its aquatic toxicity. See 40 C.F.R. § 302.4. Yet any amount of copper released into the air from any facility in any form is automatically a CERCLA "hazardous substance" to which § 309 applies.

Furthermore, Section 309 is not limited to state tort actions grounded in exposure to CERCLA "hazardous substances." It governs all tort claims "for personal injury, or property damages, which are caused *or contributed to* by exposure to any hazardous substance * * * released into the environment from a facility." 42 U.S.C. § 9658(a)(1) (emphasis added). Thus, for example, a garden-variety property-damage claim in which alleged exposure to copper plays even a minor contributing role will trigger the federally mandated commencement date in lieu of state law.

If permitted to stand, the court of appeals' expansion of § 309's plain text to reach not only state statutes of limitation (which are procedural) but also state statutes of repose (which are substantive) will have serious ramifications on state tort law far beyond the context of environmental litigation—inadvertently upsetting the balance states have struck among competing interests, goals, and priorities in their substantive tort laws. This accidental abolition of state statutes of repose runs up against the problems discussed in Part I, *supra*. It alters state substantive law and threatens the efforts states have undertaken to improve their economies and the opportunities available to their citizens. Congress did not go so far. The plain text of the statute should control, and the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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CTS CORPORATION,
Petitioner,

v.

PETER WALDBURGER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

DRI—The Voice of the Defense Bar is an organization composed of more than 22,000 attorneys involved in the defense of civil

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[1] Each party has consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

litigation. In addition to enhancing the skills, effectiveness, and professionalism of defense counsel, DRI is committed to improving the efficiency and fairness of the civil justice system. To help fulfill that mission, DRI regularly files *amicus curiae* briefs in Supreme Court cases presenting significant issues that affect the conduct of civil litigation.

The question presented here—whether § 309 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9658, applies to state statutes of repose in addition to state statutes of limitations—is such an issue. It is important to DRI and its members for at least three reasons.

First, the question before this Court involves an express preemption provision that affects the filing of state-law tort suits. DRI and its members have a strong and enduring interest in proper judicial interpretation and application of express preemption provisions, particularly those that apply to state tort suits brought against companies that manufacture or distribute products. Because the "plain wording" of an express preemption provision is the "best evidence" of Congress' preemptive intent, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (internal quotation marks omitted), DRI believes that courts should neither broaden nor narrow preemption provisions by straining to find ambiguity where, as in the case of § 9658, none exists.

Second, the question presented involves the viability of state statutes of repose. As a practical matter, the Fourth Circuit's holding eviscerates any statute of repose that applies to private party causes of action for personal injury or property damage arising out of exposure to hazardous substances that are subject to the CERCLA remedial scheme. DRI and its members not only have a long-standing interest in the defense of toxic/environmental tort litigation, but also in the proper judicial interpretation and application of legislatively enacted time constraints, i.e., statutes of limitations *and* statutes of repose, that restrict the filing of such suits.

Third, the Fourth Circuit's holding implicates both the separation of powers and federalism, subjects that are of profound and continual concern to DRI and its members. Section 9658 expressly preempts and replaces any state statute of limitations commencement date that is earlier than the "federally required commencement date"—a date that is not triggered unless and until a plaintiff knew or should have known that the hazardous substance at issue "caused or contributed to" personal injury or property damage. 42 U.S.C. § 9658 (emphasis added). This unusually lenient, federally required commencement date supplants the normal discovery-of-injury rule which most states have incorporated into statutes of limitations applicable to causes of action involving CERCLA-covered substances. During the 28 years since Congress added § 9658 to CERCLA, many states have enacted and/or retained statutes of repose

that extinguish such causes of action after a specified period of time. Those state statutes of repose preserve a measure of fairness for defendants by eliminating the threat of virtually eternal liability for causes of action that benefit from statutes of limitations subject to § 9658. The Fourth Circuit's opinion destroys this federal-state balance: The court's holding rewrites Congress' unambiguous and carefully considered express preemption provision in a way that usurps both congressional and state legislative prerogatives and drastically skews toxic/environmental tort litigation in favor of plaintiffs.

SUMMARY OF ARGUMENT

This case requires the Court to do nothing more than apply the principle that the plain text of an express preemption provision is the best evidence of congressional intent. The unambiguous language of the CERCLA preemption provision at issue here, 42 U.S.C. § 9658, and hence that provision's preemptive scope, is limited to a "State statute of limitations." There is not the slightest hint in the statutory text that the term "statute of limitations" somehow was intended to include a state statute of repose. In fact, the preemption provision's Definitions section refers only to "a statute of limitations" when setting forth the meanings of "applicable limitations period and "commencement date." *Id.* § 9658(b)(2) & (3). Furthermore, even if the Fourth Circuit were correct that the term "statute of limitations" is

ambiguous, the court of appeals violated this Court's express preemption jurisprudence by interpreting that "ambiguity" in a way that favors, rather than disfavors, preemption.

By misinterpreting and expanding the scope of § 9658, the court of appeals has essentially nullified state statutes of repose, which at least to some extent, counter-balance statutes of limitations that are subject to § 9658's extraordinarily forgiving, federally required commencement date. If the circuit court's ruling is upheld, the congressionally intended balance embodied by § 9658 will be destroyed, and plaintiffs will have free rein to file (often at the urging of counsel) toxic/environmental tort suits involving CERCLA-covered substances *decades* after an alleged cause of action arises. Section 9658 preserves state legislative prerogatives to enact and enforce statutes of repose that help to avoid burdening the courts, as well as corporate defendants, with stale claims and the evidentiary nightmares typically associated with them.

The Court should hold that § 9658 means what it says.

ARGUMENT

I. THIS COURT'S EXPRESS PREEMPTION PRINCIPLES REQUIRE THAT § 9658 OF CERCLA BE GIVEN ITS PLAIN MEANING

There can be no doubt that § 9658 is a congressionally enacted, express preemption provision. The Fourth Circuit's opinion explains

that "if a state statute of limitations provides that the period in which an action may be brought begins to run prior to a plaintiff's knowledge of his injury, § 9658 *preempts* the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge" of the injury and its alleged cause. Pet. App. 6a-7a (emphasis added); *see also McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008) (referring to state law rules that Congress "intended to preempt" by enacting § 9658); *Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.*, 419 F.3d 355, 358 (5th Cir. 2005) (explaining that the question presented is "whether § 9658 . . . preempts the Texas statute of repose").

"Where, as in this case, Congress has superseded state legislation by statute," a court's "task is to 'identify the domain expressly preempted.'" *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)). And where, as here, "a federal law contains an express preemption clause," a court must "'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1977 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

"Here, the reach of the plain language of § 9658 does not extend to statutes of repose . . . . Literally, § 9658 states that it only preempts . . . the applicable state *statute of limitations*." *Burlington Northern*, 419 F.3d at 362. Section

9658 "contains five uses of the term 'statute of limitations,' but no use of 'statute of repose.'" *McDonald*, 548 F.3d at 780. "Of critical import," § 9658 includes definitions of two key operative terms—"applicable limitations period" and "commencement date"—and each refers only to "a statute of limitations." Pet. App. 21a (Thacker, J., dissenting) (quoting 42 U.S.C. § 9658(b)(2) & (3)). These definitions demonstrate that § 9658 is a precisely tailored preemption provision that expressly applies to statutes of limitations while nowhere mentioning statutes of repose. This is a classic case for application of the statutory construction cannon "*expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *see also Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011) (same).

Statutes of repose and statutes of limitations each have "distinct definitions." Pet. App. 24a (Thacker, J., dissenting). And "the differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Burlington Northern*, 419 F.3d at 362. "A statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time," whereas "[a] statute of repose limits the time during which a cause of action can arise and usually runs from an act of a defendant." *Id.* at 363. "In other words, a statute of repose establishes a 'right not to be sued,' rather than a 'right to sue.'" *Id.* The *Waldburger* majority

acknowledged that "[w]here repose is concerned, 'considerations of the economic best interests of the public as a whole' are at play, and 'substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants [are] struck by determining a time limit beyond which liability no longer exists.'" Pet. App. 10a (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 886 (4th Cir. 1989)).

In light of the CERCLA § 301(e) study group report that preceded enactment of § 9658, "Congress was clearly on notice that statutes of repose [are] separate and distinct from statutes of limitations." *Id.* at 32a (Thacker, J., dissenting). According to the Fourth Circuit panel majority, however, § 9658 is "a statute that is ambiguous" and whose "text is susceptible" to an interpretation that broadens its preemptive scope beyond statutes of limitations to encompass statutes of repose. *Id.* at 12a. But even if that "alternate reading" were plausible, *id.*, the majority's conclusion that § 9658 should be afforded the more expansive interpretation conflicts with Supreme Court case law indicating that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that *disfavors* pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005) (emphasis added)); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 335 (2008) (same). The reading that disfavors preemption here is to interpret

§ 9658 to mean what it says—that the federally imposed commencement date applies only to state statutes of limitations.[2]

Enactment of § 9658 "reflected the process of legislative compromise." Pet. App. 33a (Thacker, J., dissenting); *see also Burlington Northern*, 419 F.3d at 364. If Congress had wanted § 9658 to

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[2] As discussed in Judge Thacker's dissent and the Fifth Circuit's *Burlington Northern* opinion, any "alternate reading" of § 9658 that encompasses statutes of repose is *implausible*. The Court's "job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone*, 505 U.S. at 544 (Scalia, J., dissenting). This case involves an express preemption provision that is unambiguous on its face. As a result, there is no need for the Court to "interpret" or alter that provision's plain meaning by applying a "presumption against preemption," whose nature, weight, applicability, and very existence continue to vex and divide the Court, including in cases involving express preemption provisions. *Compare Altria Group*, 555 U.S. at 99 ("Since *Cipollone*, the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context.") (Thomas, J. dissenting) *with Riegel*, 552 U.S. at 334 ("Federal laws containing a preemption clause do not automatically escape the presumption against preemption.") (Ginsburg, J., dissenting). The Court should "leave for another day," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000), further consideration of whether, or in what way, a presumption against preemption applies to interpretation or application of express preemption provisions.

apply to statutes of repose as well as statutes of limitations, it could have explicitly referred to both in that preemption provision's text. Congress knows how to draft an all-encompassing preemption provision when it wishes to do so. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012) (Federal Meat Inspection Act's preemption provision "sweeps widely"); *Cipollone*, 505 U.S. at 521 (Public Health Cigarette Smoking Act's preemption provision "sweeps broadly"). Congress also is deft at drafting preemption provisions more narrowly and with precision. *See, e.g.*, *Bruesewitz*, 131 S. Ct. at 1072 (analyzing the precise language of the National Childhood Vaccine Injury Act's preemption provision). There is nothing in the text of § 9658 to indicate that the term "statute of limitations" should be given anything other than its "normal meaning." *Riegel*, 128 S.Ct. at 1008.

Alternatively, if Congress had wanted § 9658 to apply to statutes of repose as well as statutes of limitations, it could have used what historically has been considered to be the broader of the two terms, i.e., statutes of repose. *See* Pet. App. 24a (Thacker, J., dissenting) (explaining that historically, a statute of limitations was considered to be a type of statute of repose); *see also U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . are statutes of repose . . . ."); *cf. Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that since the term "State" encompasses political subdivisions, an express preemption provision that only mentioned States also applied to political subdivisions).

Insofar as the historical evolution of terminology matters to interpretation of a plainly worded preemption provision like § 9658, the Fourth Circuit majority's suggestion that use of the narrower term (statute of limitations) encompasses the broader term (statute of repose), *see* Pet. App. 13a, makes no sense. "Common sense"—not the lack thereof—is "a "fundamental principle of statutory construction," and compels the conclusion that § 9658 does not extend to statutes of repose. *Burlington Northern*, 419 F.3d at 364.

"Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1980 (quoting *Exxon Mobil Corp. v. Allapattah Servs, Inc.*, 545 U.S. 546, 568 (2005)). Nevertheless, based on the mistaken premise that the text of § 9658 is ambiguous, the majority relied upon legislative history "to interpret the statute." Pet. App. 14a. But neither CERCLA's general remedial purpose, nor even the § 309 study group's apparent concern about the effect of statutes of repose, is enough to read statutes of repose into § 9658's preemptive scope. Indeed, the fact that the study group—which was composed of attorneys who were not members of Congress—specifically recommended that statutes of repose be repealed is compelling evidence that "[b]y the plain language of § 9658, Congress disagreed" and confined that provision to statutes of limitations. Pet. App. 32a (Thacker, J., dissenting); *cf. Bruesewitz*, 131 S. Ct. at 1071 (Congress' omission was "by deliberate choice, not inadvertence")

(internal quotation marks omitted). It is not a court's "job to speculate upon congressional motives" underlying that decision, *Riegel*, 552 U.S. at 326, but instead, to "focus on the plain wording of the clause" that was enacted, *CSX Transp.*, 507 U.S. at 664.

II. STATUTES OF REPOSE HELP TO ACHIEVE BALANCE AND FAIRNESS IN THE CIVIL JUSTICE SYSTEM

This Court repeatedly has recognized "'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). "[A]lthough affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *U.S. v. Kubrick*, 444 U.S. at 117.

Statutes of repose are "premised upon a theme of fairness to defendants." Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 354 (2006). In the toxic/environmental tort context, state "legislatures may reasonably conclude that claims should no longer be viable after a certain number of years following substantial completion of

improvements to real property." *Id.* at 350. Such statutes of repose help to mitigate the serious, and sometimes insurmountable, evidentiary difficulties that would confront corporate defendants (or their successors) if sued decades after an alleged toxic/environmental tort arises. *Id.* at 354. In addition, such statutes of repose help to control liability insurance premiums. *Id.* at 355.

The need for statutes of repose as a mechanism for maintaining some semblance of a level playing field in toxic/environmental tort litigation is particularly compelling where there is a corresponding statute of limitations that is subject to § 9658's protracted, federally required commencement date. Even without the intrusion of § 9658, the "discovery rule" normally incorporated into state statutes of limitations (i.e., the rule that the limitations period does not begin to run until the plaintiff knew or should have known about the injury) "promotes unfairness for manufacturers and inconvenience for the courts." David G. Owen, *Special Defenses In Modern Products Liability Law*, 70 MO. L. REV. 1, 42 (2005). The federally required commencement date that § 9658 interjects into state statutes of limitations in lieu of the normal discovery rule goes much further and "clearly put[s] a thumb on the scales in favor of assisting plaintiffs." Pet. App. 36a (Thacker, J., dissenting).[3]

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[3] The court of appeals mistakenly viewed CERCLA's remedial purpose as a license to rewrite the plain

{footnote continued}

Construing § 9658 to apply to state statutes of repose in addition to state statutes of limitations would drastically tilt the playing field in favor of plaintiffs: Like the applicable statute of limitations, the statute of repose would not begin to run until the plaintiff knew or reasonably should have known about the alleged cause of the personal injury or property damage. And since statutes of repose almost always have a considerably longer duration than corresponding statutes of limitations (primarily to enable plaintiffs to take advantage of the discovery rule), the statute of limitations would expire first, thereby rendering the statute of repose meaningless and destroying its countervailing function. In other words, claims that otherwise would be extinguished by the statute of repose instead would remain alive or be revived.

The Fourth Circuit panel majority correctly predicted that its holding would "raise the ire" of defendant corporations (and their legal counsel). Pet. App. 35a. The court's holding destroys the

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language of § 9658 to encompass statutes of repose, and thereby create an additional advantage for tort plaintiffs. Individuals who suffer property damage due to CERCLA-covered substances do not need that type of assistance. As an alternative to a state-law nuisance suit, they can remove or remediate contamination and then file a private cost-recovery action under CERCLA § 107, 42 U.S.C. § 9607, without regard to fault.

balance that Congress struck in § 9658 by enacting a preemption provision that interjects the federally required commencement date into state statutes of limitations but *not* into state statutes of repose. That balance represents a "basic concession to federalism." Robin Kundis Craig, *Federalism Challenges To CERCLA: An Overview*, 41 SW. L. REV. 617, 633 (2012). "It is the prerogative of Congress to strike that balance," Pet. App. 35a (Thacker, J., dissenting), and not within the power of the judiciary to upset it.

CONCLUSION

This Court should reverse the Fourth Circuit and hold that § 9658 applies only to state statutes of limitations.

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RECORD
AND
BRIEFS

No. 13-339

In The
Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF JERRY ENSMINGER, THE ESTATE OF CHRISTOPHER TOWNSEND, MIKE PARTAIN, KRIS THOMAS, AND THE ESTATE OF ROSANNE WARREN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 9658 preempts periods of repose such as that found in N.C. Gen. Stat. § 1-52.

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INTEREST OF *AMICI CURIAE*[1]

Jerry Ensminger, the Estate of Christopher Townsend, Mike Partain, Kris Thomas, and the Estate of Rosanne Warren submit this brief as *amici curiae* in support of respondents. *Amici* lived on or near Marine Corps Base Camp Lejeune in Jacksonville, North Carolina, at various points between the 1950s and 1985. During this period, drinking water provided through Camp Lejeune's Tarawa Terrace and Hadnot Point water systems was highly contaminated with multiple human carcinogens. The toxic exposure had devastating consequences for these *amici*, and for many other Marines and their families.

Jerry Ensminger joined the United States Marines after graduating from high school in 1970. Ensminger and his wife were assigned to Camp Lejeune in 1973. In 1975, while the couple was living in the base's Tarawa Terrace neighborhood, Ensminger's wife became pregnant with their second child. The family moved away from Camp Lejeune in December 1975, and their daughter Janey was born in South Carolina on July 30, 1975. In 1982, the Ensmingers returned to Camp Lejeune. Although the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Respondents have provided *amici* with written consent to the filing of this brief, and petitioner has consented to the filing of this brief by a blanket agreement filed with the clerk of this Court.

family lived off-base, Janey frequently visited the base, often spending time at the base swimming pools. Janey was thus exposed to Camp Lejeune's carcinogenic water both *in utero* and as a young child. In the summer of 1983, Janey fell ill and was ultimately diagnosed with acute lymphocytic leukemia. After a grueling course of chemotherapy, Janey died on September 24, 1985, at age nine. Jerry Ensminger had no reason to suspect that Camp Lejeune's water could have contributed to his daughter's death until 1997, when he saw a news report about possible contamination on base. When he contacted the Marine Corps and the Navy, officials assured him that the contamination was minor and could not have been responsible for Janey's illness and death. Not satisfied by these assurances, he began his own investigation and uncovered years of evidence suppression and deceit by the military regarding the contamination at Camp Lejeune.

Tom Townsend joined the Marines in 1949 at age 18. He and his wife Ann had a healthy son in 1955 and a healthy daughter in 1962. Assigned to Camp Lejeune in 1965, they were living in a neighborhood served by the base's Hadnot Point water system when their third child was conceived. Christopher Townsend was born on March 16, 1967, in the Camp Lejeune naval hospital. The baby struggled immediately after birth, and was diagnosed with serious heart defects. Over the following weeks, Christopher was treated in the Camp Lejeune naval hospital, and twice admitted into the naval hospital in Bethesda,

Maryland. On June 27, 1967, Christopher Townsend died after living just three and a half months. An autopsy revealed that he died of congenital malformation of the heart. Tom Townsend only realized that his wife and infant son may have been exposed to toxic water at Camp Lejeune in 1998, after reading an article in a magazine. He would eventually work with Jerry Ensminger to uncover countless documents demonstrating the extent of the contamination and the scope of the government's efforts to suppress the evidence. Townsend currently has a claim under the Federal Tort Claims Act ("FTCA") pending before the Department of the Navy on behalf of his son's estate.

Mike Partain is the grandson and son of Marine officers whose combined service includes World War II, the Korean War, and the Vietnam War. Conceived in 1967 and born in 1968 at Camp Lejeune, Partain was exposed to the base's carcinogenic drinking water *in utero* and as an infant. Partain lived a seemingly normal life until April 2007, when, on his eighteenth wedding anniversary, he was diagnosed with male breast cancer. He underwent a right mastectomy and eight rounds of active chemotherapy, followed by a year of oral chemotherapy. Male breast cancer is exceptionally rare and its occurrence peaks in men aged 71 years. Partain developed the disease at age 39, has no family history of breast cancer, and lacks the genetic mutation common in most male breast cancer victims. Partain was unaware of his exposure to carcinogenic chemicals in Camp Lejeune's water until

two months after his diagnosis, when his father viewed a CNN report featuring Jerry Ensminger's congressional testimony about Camp Lejeune's contamination. Partain volunteered as an advocate for those poisoned at Camp Lejeune, and has identified an ever-expanding cluster of male breast cancer victims who were similarly exposed to Camp Lejeune's toxic drinking water. Partain currently has a claim under the FTCA pending with the Department of the Navy.

Kris Thomas is the son of a United States Marine. Born in 1958, Thomas lived in Camp Lejeune's Tarawa Terrace from approximately 1965 to 1970, just a few streets down from Mike Partain. Thomas's father was stationed at Camp Lejeune. In 1970, the Thomas family moved off base, but he regularly visited the base. Thomas enjoyed swimming and frequented Camp Lejeune's pools, waterways, and ponds. Thomas also attended school on base and received medical treatment at the base hospital. As an adult, Thomas served as a Church of God minister until 2004, when he was diagnosed with male breast cancer. He had surgery to remove the carcinoma and affected lymph nodes, and then underwent several months of chemotherapy. His treatment required him to resign from the ministry. Thomas only realized that he and his family had been exposed to carcinogens at Camp Lejeune when his wife read an article about Mike Partain's advocacy in a local newspaper in October 2007. Thomas currently has a claim

under the FTCA pending before the Department of the Navy.

Rosanne Warren was born in 1971. Her mother, Patricia Warren, had worked on Camp Lejeune's Hadnot Point throughout her pregnancy. Through the early 1980s, Rosanne would frequently visit and stay with family friends in Tarawa Terrace while her mother was working. When she was twelve years old, Rosanne began suffering from serious kidney problems, which required multiple stent implants. Despite her medical problems, Rosanne attended college, and went on to receive a degree in medical technology. In her mid-20's, Rosanne was diagnosed with cervical cancer. She underwent chemotherapy, radiation, and surgical removal of her uterus. Despite aggressive treatment, the cancer returned in her hip and kidney. Rosanne died in 2000, at age 28. Her mother Patricia did not learn that she and her daughter had been exposed to carcinogens at Camp Lejeune until 2008, when a friend told her about a community meeting discussing the issue. Patricia Warren is currently pursuing an FTCA claim on behalf of her daughter's estate before the Department of the Navy.

Amici's interest in this case is substantial because its resolution could impact their claims against the government, as well as those of other victims of the Camp Lejeune contamination. Many of these victims are pursuing FTCA claims before the Navy. Some are pursuing FTCA claims in federal court. Those claims have been consolidated and are on appeal before the Eleventh Circuit. *See Bryant v. United*

States; Camp Lejeune Water Contamination Litigation v. United States, No. 12-15424 (11th Cir., argued Jan. 17, 2014). In the Eleventh Circuit, the United States contends that North Carolina's statute of repose shields the government from all liability for injuries to the Camp Lejeune victims. Its argument in the Eleventh Circuit as to CERCLA preemption is nearly identical to the one it now makes to this Court as *amicus curiae*. *See* Brief of the United States, *Camp Lejeune Water Contamination Litigation*, No. 12-15424 (11th Cir. filed Feb. 11, 2013).

Amici also have a strong interest in ensuring that individuals with a long-latency cancer due to toxic contamination can pursue recovery in states with similar periods of repose. *Amici* have experienced cancer's devastating impact on individuals, families, and communities. If state statutes are permitted to bar victims of long-latency cancers from pursuing claims against those who caused their suffering, many victims will have no effective legal recourse, regardless of how clearly they were wronged.

Finally, *amici* know firsthand the extent to which perpetrators will attempt to hide their wrongs from victims. The Navy has required that Camp Lejeune test its water systems annually since 1963, but no records exist of any such tests until 1980. Although Camp Lejeune officials received reports of the water contamination as early as 1980, they did not begin closing wells on base until November 1984. For over two decades, the United States failed to notify potential victims of their exposure to contaminated

water, suppressed information regarding the extent of the contamination, and refused to provide medical support. It took an act of Congress in 2007 for the military to begin formally notifying all exposed personnel and their families. Had Camp Lejeune officials notified these individuals more promptly, the suffering of countless victims could have been reduced through preventive care, aggressive monitoring, and early treatment.

SUMMARY OF THE ARGUMENT

Camp Lejeune's water supply was contaminated with dangerous carcinogens for decades. Although the military had reason to know of the contamination, it did nothing to address the problem. Once the government finally began closing contaminated wells, it concealed the scope of the contamination for many years. *Amici* and countless others have had their lives devastated because of exposure to Camp Lejeune's contaminated water. Because cancer often develops many years after an individual is exposed to carcinogens, most of these victims did not know of their injuries until many years after they left Camp Lejeune. Those who developed injuries more immediately did not know that Camp Lejeune's water could have been the cause until the government's deception was exposed.

In 1986, Congress enacted legislation ensuring that individuals who develop long-latency diseases

because of exposure to hazardous waste would have the opportunity to bring suit, regardless of state limitation periods. This legislation was intended to address claims such as those arising from Camp Lejeune's water contamination. Petitioner and the United States as *amicus*, however, argue that the federal law has no effect on North Carolina's statute of repose. Their interpretation contravenes both the text and the intent of the 1986 legislation. If adopted, it would prevent the victims of Camp Lejeune from having any legal recourse, and would reward entities that conceal their misconduct. *Amici* and others similarly situated should not be excluded from the law's protection.

ARGUMENT

1. EXTENSIVE WATER CONTAMINATION AT CAMP LEJEUNE LASTED FOR DECADES, WAS CONCEALED BY THE GOVERNMENT, AND AFFECTED THOUSANDS OF MARINES AND CIVILIANS.

A. The government exposed Marines and their families to toxic water for decades.

Founded in 1941, Camp Lejeune is the largest Marine Corps base on the East Coast. On approximately 220 square miles adjacent to Jacksonville, North Carolina, the base typically serves more than 100,000 service members, military families, and

civilian personnel. *Amici* and their families once lived on or near this base.

The government maintained a cavalier attitude toward waste disposal at Camp Lejeune for much of the mid-twentieth century. Although the base had a hazardous waste dump since 1959, military officials permitted the disposal of waste at other locations throughout the base. Mike Magner, *A Trust Betrayed: The Untold Story of Camp Lejeune and the Poisoning of Generations of Marines and Their Families* 33-34, 55-59 (Da Capo Press 2014).[2] Waste was generally either dumped onto the land or into ditches dug by Marines. *Id.* at 33-34. These wastes included industrial cleaning solvents, gasoline, oil, mustard gas, battery acid, heavy metals, and pesticides. *Id.* at 55-59, 87-90. In addition, as much as one million gallons of fuel from the base's fuel depot leaked into the soil, forming large pools of diesel and gasoline floating on top of the aquifer closest to the surface. *Id.* at 87, 209-11.

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[2] Many of the original source documents upon which Magner relies were uncovered through the tireless efforts of advocates for Camp Lejeune's victims. In 2007, the Agency for Toxic Substances and Disease Registry released many of these documents along with a water modeling study of Tarawa Terrace. Advocates for Camp Lejeune victims have compiled a more comprehensive account of the events discussed in this brief with accompanying citations to these original sources. That account can be accessed at http://tfltptf.com/Misc/Timeline_Linked_March_2012.pdf.

Camp Lejeune is supplied by on-base water wells. Since at least 1963, the Navy recognized that it was "responsible for the protection and the purity of the water during its distribution on its premises." Dep't of Navy, Manual of Naval Preventative Medicine ("NAVMED"), P-5010 § 5-23 (August 1963), *available at* http://www.tftptf.com/New_ATSDR1/NAVMED_P-5010-5_1963.pdf. It likewise recognized that "ground waters are becoming polluted with increasing frequency and the resulting hazards require special surveillance," particularly from "chemical pollutants originating either from sewage or industrial effluents." *Id.* § 5-32, Appendix A. Accordingly, the Navy required that a "complete chemical analysis of the water supply shall be made annually[,]" with the additional requirement that "[i]f the supply is from wells, water from each well is analyzed." *Id.* § 5-32(5)(a). Despite these requirements, there is no indication that Camp Lejeune's water systems or wells were tested in the years before 1980.

In 1974, Camp Lejeune officials acknowledged that they understood the risk posed by industrial pollutants. That year, the Camp Lejeune Base Commander issued an order recognizing that "organic solvents were hazardous materials," and that "improper disposal practices create hazards such as the contamination of drinking water." U.S. Marine Corps, Camp Lejeune Base Order 5100.13B (June 27, 1974), *available at* http://tftptf.com/CLW_Docs/CLW5996.pdf. Knowing the source of the base's drinking water and the extent and nature of the waste disposed at the

base, military officials had many reasons to suspect that the water system was already contaminated. *See* Magner, *supra*, at 55-59.

Officials would eventually have definitive proof. In the wake of impending federal water quality regulations, base officials had water samples independently evaluated in 1980 and 1981. *Id.* at 45-47. These evaluations repeatedly revealed that Camp Lejeune's drinking water was highly contaminated, and generated numerous written warnings to military officials. *Id.* The first report from October 1980 stated: "heavy organic interference . . . you need to analyze for chlorinated organics." *Id.* at 46. Another from 1981 flatly stated: "water highly contaminated with other chlorinated hydrocarbons (Solvents)!" *Id.* at 46. Despite these warnings, the military made no effort to shut down wells, improve water quality, or notify Marines and their families of the dangerous contaminants in their drinking water.

In 1982, tests revealed that the base's water was contaminated with the cleaning solvents Trichloroethylene ("TCE") and Perchloroethylene ("PCE"). *Id.* at 51-52. A sample from the Hadnot Point system contained 1,400 parts per billion ("ppb") of TCE. *Id.* at 53. At the time, the Navy's Bureau of Medicine and Surgery ("BUMED") Instructions limited the concentration of chlorinated hydrocarbons such as TCE and PCE in drinking water to maximums ranging from 3 to 100 ppb. *See* Dep't of Navy, BUMED Instruction 6240.3C at 6 (Dec. 13, 1972), *available at* http://tftptf.com/CLW_Docs/CLW0144.pdf. Although water test

results were reported up the chain of command, the military made no effort to further investigate or address the problem. Magner, *supra*, at 51-53.

It was not until late 1984 that military officials took any action. In November and December of that year, three wells were closed after tests revealed TCE concentrations ranging from 300 to 1,600 ppb, along with elevated levels of benzene and other industrial contaminants. *Id.* at 69-70. Approximately one month after these wells were taken out of service, an on-base elementary school water fountain was found to contain 1,100 ppb of TCE. *Id.* at 71. Additional tests then revealed TCE contamination levels in some wells as high as 18,900 ppb. *Id.* Camp Lejeune finally closed its contaminated wells in 1985. *Id.*

The Agency for Toxic Substances and Disease Registry ("ATSDR") has conducted multi-year studies on Camp Lejeune's water contamination. *See* Morris L. Maslia, et al., *Analyses and Historical Reconstruction of Groundwater Flow, Contaminant Fate and Transport, and Distribution of Drinking Water Within the Service Areas of the Hadnot Point and Holcomb Boulevard Water Treatment Plants and Vicinities, U.S. Marine Corps Base Camp Lejeune, North Carolina* (March 2013) ("ATSDR Hadnot and Holcomb Report"), *available at* http://www.atsdr.cdc.gov/sites/lejeune/hadnotpoint.html; Morris L. Maslia, et al., *Analyses of Groundwater Flow, Contaminant Fate and Transport, and Distribution of Drinking Water at Tarawa Terrace and Vicinity, U.S. Marine Corps Base Camp Lejeune, North Carolina: Historical Reconstruction*

and Present-Day Conditions (March 2009) ("ATSDR Tarawa Terrace Report"), *available at* http://www.atsdr.cdc.gov/sites/lejeune/tarawaterrace.html. These studies performed historical reconstruction calculations to estimate the monthly levels of contaminants in the drinking water provided to on-base family housing units. ATSDR Tarawa Terrace Report, *supra*, at A2; ATSDR Hadnot and Holcomb Report, *supra*, at A2.

The ATSDR's studies demonstrate that Camp Lejeune's Tarawa Terrace and Hadnot Point water systems were highly contaminated with multiple known human carcinogens from the 1950s to 1985. ATSDR Tarawa Terrace Report, *supra*, at A70; ATSDR Hadnot and Holcomb Report, *supra*, at A100-01. Because Camp Lejeune's water systems had different degrees of contamination, individuals living on base during the contaminated period experienced varying levels of exposure.

B. The government concealed the nature and scope of Camp Lejeune's contamination.

After exposing its Marines, civilian personnel, and their families to poisonous water for decades, the government compounded its malfeasance by making every effort to prevent these victims, including *amici*, from learning that they had been exposed to dangerous carcinogens.

After they closed contaminated wells in 1984 and 1985, military officials downplayed the extent of the contamination through euphemistic language that

obscured the problem and deceived the victims. For example, around the time the wells were shut down, Camp Lejeune's waste disposal practices had begun attracting media attention. Although the base's drinking water had been highly contaminated for years, base officials represented to the media that "people had not been directly exposed to the pollutants[,]" and characterized the closure of wells as "precautionary measures." Jerry Allegood, *Civilians, military investigating waste dumps at Camp Lejeune*, Raleigh News & Observer, Sept. 15, 1985, at 29A. In requesting residents of the Tarawa Terrace neighborhood to reduce their water usage, Camp Lejeune's base commander indicated that two wells had been shut down "because of minute (trace) amounts of several organic compounds." Magner, *supra*, at 73. The notice stated that "[t]here are no definitive State or Federal regulations regarding a safe level of these compounds, but as a precaution, I have ordered the closure of these wells for all but emergency situations[.]" *Id.* Contrary to these assertions, Camp Lejeune's water had previously contained as much as 300 times the TCE levels then permitted by the Navy. *See* BUMED Inst. 6240.3C at 6.

The military would continue its deceptive conduct for many years to come. It resisted turning over files to the ATSDR, Magner, *supra*, at 100; fought a proposed ATSDR study of infants born at Camp Lejeune, *id.* at 104; and refused to fund surveys to locate children born on the base, *id.* at 107. It misled the Environmental Protection Agency ("EPA") as to

when water tests had been conducted and what those tests revealed. William R. Levesque, *Camp Lejeune water contamination history detailed in documents*, Tampa Bay Times, October 16, 2009, *available at* http://www.tampabay.com/news/military/veterans/camp-lejeune-water-contamination-history-detailed-in-documents. In 2010, a news reporter revealed that the Navy and Marine Corps had simply failed to turn over many relevant documents to the ATSDR, including one estimating that over one million gallons of fuel had leaked into the ground from the Hadnot Point fuel farm. Magner, *supra*, at 211. Military officials went so far as to advocate delaying the mailing of health questionnaires to ensure that they did not coincide with the release of the movie *A Civil Action*, which addressed the relationship between TCE contamination and childhood leukemia in Woburn, Massachusetts. *Id.* at 110. Indeed, military officials' resistance was so egregious that the EPA investigated whether their deceptive conduct warranted criminal charges for obstruction of justice. *Id.* at 167-68.

Even after being publicly reprimanded by members of Congress, the military refused to notify all affected Marines until forced to do so by the John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 318(b), 120 Stat. 2083 (2006). This law also required the Navy to fund comprehensive studies evaluating the impact of pre-natal, childhood, and adult exposure to Camp Lejuene's contaminated water. *Id.* § 318(a).

C. Camp Lejeune's toxic water devastated countless lives.

The chemicals found in Camp Lejeune's water included TCE, PCE, benzene, and vinyl chloride ("VC"). *See* Frank J. Bove, et al., *Evaluation of mortality among marines and navy personnel exposed to contaminated drinking water at USMC base Camp Lejeune: a retrospective cohort study*, Environmental Health 2014 13:10 ("Marine Cohort Study"), *available at* http://www.ehjournal.net/content/13/1/10. These chemicals can be absorbed into the body through ingestion, skin exposure, and inhalation. *Id.* at 2. For example, an individual taking a ten-minute shower can absorb as much TCE through inhalation as he or she would by drinking two liters of the same water. *Id.* By the time Camp Lejeune began shutting down contaminated wells, its drinking water contained levels of these volatile organic compounds that were hundreds of times greater than what is considered safe for humans. As many as one million people could have been exposed to Camp Lejeune's contaminated water.

TCE, benzene, and VC are known human carcinogens; PCE is considered a "likely" human carcinogen. ATSDR Hadnot and Holcomb Report, *supra*, at A16. Exposure to these chemicals is associated with a wide variety of cancers and diseases, including leukemia, breast cancer, bladder cancer, kidney cancer, cervical cancer, liver cancer, non-Hodgkin's lymphoma, and multiple myeloma. *See* ATSDR, *Reported health effects linked with trichloroethylene (TCE), tetrachloroethylene (PCE), benzene, and vinyl chloride*

(VC) exposure, *available at* http://www.atsdr.cdc.gov/sites/lejeune/tce_pce.html (last visited March 27, 2014) (collecting scientific studies). *In utero* exposure to TCE and PCE is associated with childhood leukemia, major heart defects, neural tube defects, and fetal death. *Id.*

Individuals exposed to Camp Lejeune's contaminated water have significantly elevated rates of cancer mortality. A recent study compared the mortality rates of all Marines posted at Camp Lejeune between 1975 and 1985 to that of Marines posted at California's Camp Pendleton during the same period. *See* Marine Cohort Study, *supra*. The study found that Camp Lejeune Marines were more likely to die from several causes, including "kidney cancer, liver cancer, esophageal cancer, cervical cancer, multiple myeloma, Hodgkin lymphoma, and [Amyotrophic Lateral Sclerosis]." *Id.* at 13. Marines with high cumulative exposures to Camp Lejeune's contaminants had substantially higher cancer mortality rates. For example, Camp Lejeune Marines with high exposure to contaminated water were 580% more likely to die of cervical cancer than Camp Pendleton Marines, while Camp Lejeune Marines with low to no exposure to contaminated water were 112% more likely to die of cervical cancer than Camp Pendleton Marines. *Id.* at 9.

Children born to women exposed to the contaminated water during their pregnancy also experienced higher rates of juvenile diseases and disorders. A 2013 epidemiological study evaluated whether *in*

utero and infant exposures to the base's contaminated water were associated with a defined set of birth defects and childhood cancers. Perri Z. Ruckart, et al., *Evaluation of exposure to contaminated drinking water and specific birth defects and childhood cancers at Marine Corps Base Camp Lejeune, North Carolina*, Environmental Health 2013, 12:104, *available at* http://www.ehjournal.net/content/12/1/104. The study found that children exposed to contaminated water *in utero* were more likely to be born with neural tube disorders such as spina bifida and anencephaly, and were more likely to develop childhood hematopoietic cancers such as childhood leukemia and childhood non-Hodgkin's lymphoma. *Id.* at 1-2.

Many cancers caused by exposure to VC, TCE, PCE, and benzene do not manifest until decades after exposure to the chemical. "The time between first exposure to a cancer-causing agent and clinical recognition of the disease is called the latency period. Latency periods vary by cancer type, but for some cancers may be 15 to 20 years or longer." Centers for Disease Control and Prevention, Workplace Safety and Health Topics, *Cancer Clusters*, *available at* http://www.cdc.gov/niosh/topics/cancer/clusters.html (last visited March 27, 2014). In a Congressional hearing on Camp Lejeune, Dr. Michael L. Gros, a Navy obstetrician, testified that after exposure to the toxins found in Camp Lejeune's water, "[t]he cancerous effects do not appear until 10 to 15 years[.]" *Poisoned Patriots: Contaminated Drinking Water at Camp Lejeune: Hearing before the H. Comm. on Energy and Commerce*, 110th

Cong. 12, 15 (June 12, 2007) (statement of Michael L. Gros, M.D.).

In 2012, recognizing the weight of the scientific evidence, Congress enacted the Janey Ensminger Act, Pub. L. No. 112-154, 126 Stat. 1165 (Aug. 6, 2012). Under the Act, if a veteran or veteran's family member was exposed to Camp Lejeune's contaminated water for more than thirty days and later develops one of a number of listed diseases, there is a rebuttable presumption that the disease was caused by the individual's exposure. 38 U.S.C. § 1710(F). The Act establishes a presumption of causation for fifteen illnesses or conditions: breast cancer, kidney cancer, multiple myeloma, renal toxicity, female infertility, scleroderma, non-Hodgkin's lymphoma, lung cancer, bladder cancer, leukemia, myelodysplastic syndromes, hepatic steatosis, miscarriage, and neurobehavioral effects. *Id.*

While helping many of Camp Lejeune's victims, the Act provides only limited relief. Because victims are only "eligible for hospital care and medical services," *id.*, the Act provides no benefit to Tom Townsend, whose infant son died years before the Act's passage. It likewise provides limited benefit to individuals such as Kris Thomas, who was treated for his breast cancer several years before the Act's passage, but who has been unable to return to his career as a minister due to the side effects of treatment. Because the Act covers only veterans and their family members, individuals such as Rosanne Warren, who was not a family member of a veteran who served on

active duty at Camp Lejeune, would not benefit from the Act in any way.

II. CERCLA'S UNIFORM DISCOVERY RULE WAS INTENDED TO ADDRESS SITUATIONS EXACTLY LIKE THOSE EXPERIENCED BY THE VICTIMS OF CAMP LEJEUNE'S CONTAMINATED WATER.

A. As amended, CERCLA was intended to protect the rights of those suffering from long-latency diseases.

In 1980, Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). CERCLA established a twelve-person study group "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment[.]" 42 U.S.C. § 9651(e).

The study group published its report in July 1982. *See* Superfund Section 301(E) Study Group, 97th Cong., Injuries and Damages From Hazardous Wastes – Analysis and Improvement of Legal Remedies (Comm. Print 1982) ("Study Group Report"). The report recognized that "[t]he most common mode of human exposure to waste chemicals is through groundwater." Study Group Report at 13. It likewise recognized:

> Exposure to certain hazardous wastes may result in cancer, neurological damage, and in mutagenic and teratogenic changes. Most of these types of injuries have long latency periods, sometimes 20 years or longer. With long latency periods, a rule which starts the running of the statute from the time of exposure will defeat most actions before the plaintiff knows of his injury.

Id. at 28. The report therefore recommended:

> that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff 's claim before he knows that he has one.

Id. at 241.

Rather than wait for action from the states, Congress amended CERCLA in 1986 to "address[ ] the problem identified in the 301(e) study." H.R. Conf. Rep. No. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. Congress's solution established a minimum "federally required commencement date" ("FRCD") that applies to state causes of action for "personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment

from a facility[.]" 42 U.S.C. § 9658(a). The FRCD applies "[i]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the [FRCD]." *Id.* The FRCD is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4).

The FRCD is a simple and effective solution to the problems identified by the Study Group Report. It permits certain claims to be brought when an individual has discovered both an injury and its cause, regardless of whether the period for filing suit has passed under state law.

B. Petitioner's position would terminate with prejudice the claims of individuals, such as the Camp Lejeune victims, who suffer from long-latency diseases.

If not for the FRCD, claims arising from the Camp Lejeune contamination would accrue pursuant to the same North Carolina statute that would otherwise bar respondents' claims in this case. That statute provides:

> [F]or personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the

> claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16). Petitioner mistakenly argues that this provision is not subject to the FRCD.

If the FRCD does not override N.C. Gen. Stat. § 1-52(16), the North Carolina statute could bar all claims from individuals suffering from diseases with latency periods longer than ten years. But the Study Group Report's detailed discussion of the problem posed by long-latency injuries never mentioned a latency period less than ten years – indeed, it frequently addressed latency periods as long as thirty and forty years. *See, e.g.*, Study Group Report at 55 ("ten-to-forty year latency period"); *id.* at 240 (Given "the delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more[.]"); *id.* at 242 ("carcinogenic, mutagenic, and teratogenic effect may not manifest themselves until 20 or 30 years later"). Petitioner essentially argues that although Congress enacted the FRCD to address the problem, it intended to exclude entirely from its solution the handful of states that provided limitation periods similar to North Carolina's. This argument is as incoherent as it is inhumane.

The FRCD was enacted to ensure that the courthouse doors would be open to individuals like the victims of the Camp Lejeune contamination. Mike Partain was exposed to Camp Lejeune's water *in utero* and as an infant, but did not develop breast cancer until he was 39 years old. Kris Thomas was exposed throughout his childhood, but did not develop breast cancer until he was 45 years old. If petitioner's arguments are credited, these individuals will have no legal recourse. As recognized by United States District Court Judge Terrence Boyle:

> [T]hose exposed to the water at Camp Lejeune could not have connected their illnesses to the alleged contamination until studies and investigations began revealing such causation in 2007. Thus, to apply the statute of repose in this case would bar all potential claims from the over 500,000 marines and their families affected. Indeed, it would bar the overwhelming majority of claims involving any cancer.

Jones v. United States, 751 F. Supp. 2d 835, 841 (E.D.N.C. 2010).

C. Petitioner's position would absolve polluters of liability if they hide their misconduct and succeed in delaying its discovery.

The arguments of petitioner and the United States are especially disturbing given the government's attempts to cover up its misconduct at

Camp Lejeune. If the government had closed Camp Lejuene's wells when it first learned they were contaminated, Janey Ensminger and Rosanne Warren might be alive today. If the government had been forthcoming as to the scope of the problem leading to well closures, these families may have pursued claims against the government within North Carolina's statutory periods. If the government had promptly notified those who were exposed to the toxic water, countless other families may have been able to reduce the impact of their exposure through preventive care and early treatment.

Instead of being forthright about its mistakes, the military chose another approach: deception and delay. Today, it seeks the fruits of that strategy. Because it successfully prevented military families from learning the truth about Camp Lejeune's contaminated water for so many years, the United States argues that these families should be time-barred from filing any claims against it. While ordinary statutes of limitation can be tolled to account for such misconduct, those with periods of repose are not generally subject to equitable tolling. *See NCUA Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1255 (10th Cir. 2013). Should the United States' argument prevail, companies and government bodies responsible for environmental disasters in North Carolina will have every incentive to use the military's strategy here: conceal their misconduct for as long as necessary to invoke periods of repose.

By enacting the FRCD, Congress determined that entities should bear the economic costs caused by their toxic contamination. When the FRCD was used to impose liability on private enterprises, the United States embraced its remedial purpose:

> By increasing the likelihood that persons harmed by hazardous materials will obtain compensation for their injuries, the FRCD provision furthers CERCLA's purpose of "induc[ing]" companies generating, transporting, dumping and storing, etc., hazardous wastes "voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. 1, at 17 (1980). As the Study Group Report emphasized, "the economic cost of injury should be carried by the industry or enterprise that creates [it], because efforts to reduce the cost will result in greater care and more safety and protection of the public." Study Group Report 248.

Brief for the United States on Petition for a Writ of Certiorari, *Freier v. Westinghouse Elec. Corp.*, No. 02-1036 (U.S. filed March 12, 2003) (quotation marks and record citations omitted) (discussing the constitutionality of the FRCD). The government's position in *Freier* predated the lawsuits from the Camp Lejeune victims. Faced with the prospect of having to absorb the economic costs of its own misconduct, the government has reversed course. It now contends that states can circumvent the FRCD through statutes of

repose, and that entities can avoid the economic cost of their injuries by hiding their misconduct. The government's current position directly conflicts with the text and purpose of the FRCD.

Camp Lejeune's Marines were willing to give their lives to defend the United States. In return, the United States government recklessly exposed these Marines and their families to poisoned water for decades, and then concealed the facts that could have mitigated the devastating consequences. The government now asks this Court to reward its reckless misconduct and intentional deception by narrowly construing a remedial statute so as to block victims' claims for relief. But the FRCD was designed to ensure that all citizens would be able to pursue claims based on latent diseases caused by exposure to hazardous materials, regardless of the vagaries of state periods of limitation. *Amici* and others similarly situated should not be excluded from CERCLA's protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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v.

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Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF ENVIRONMENTAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law who work in the area of environmental law. They are familiar and concerned with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), one of the cornerstones of federal environmental law. *Amici* are also familiar and concerned with many aspects of the longstanding legal and policy problems raised by litigation over environmental contamination, and are interested generally in the development of environmental law. *Amici* believe that this case is an important one: it will affect the ability of many individuals and businesses to seek relief in the courts for various forms of environmental contamination and to hold accountable those responsible for such contamination. Because of that importance, *amici* believe this Court should make its decision based on complete and accurate information not only about CERCLA itself, but also about the legal background against which CERCLA was enacted.

This brief addresses one specific aspect of that legal background: the asserted distinction between statutes of limitation and statutes of repose, on which petitioner CTS Corp. ("CTS") relies heavily. In

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that neither any party nor any counsel for a party authored this brief in any part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief; petitioner filed a letter granting blanket consent to the filing of *amicus* briefs, and written consent from respondents to the filing of this brief is being filed contemporaneously with the brief.

the view of *amici*, CTS's assertions are fundamentally incorrect. Although respondents address this issue, *see* Resp. Br. 23-28, *amici* hope that this Court may find useful a more detailed examination.

Amici are described below in alphabetical order.[2]

Ronald G. Aronovsky is a Professor of Law at Southwestern Law School. He has written and taught in the area of environmental law, including as it relates to CERCLA. He also previously litigated CERCLA cases while in private practice.

William W. Buzbee is a Professor of Environmental Law at Emory Law School, where he heads the school's Environmental and Natural Resources Law Program. He has written in the areas of environmental federalism and preemption, including as they relate to CERCLA. He also previously litigated CERCLA cases and handled transactions settling CERCLA liability while in private practice.

Donald T. Hornstein is the Aubrey L. Brooks Professor of Law at the University of North Carolina School of Law. He has written and taught in the areas of environmental law and environmental policy.

Alexandra Klass is a Professor of Law at the University of Minnesota Law School. She has written and taught in the areas of environmental law and tort law, including the interactions between CERCLA and state law remedies. She also previously litigated CERCLA cases while in private practice.

Thomas O. McGarity is the Joe R. and Teresa Lozona Long Endowed Chair in Administrative Law at the University of Texas at Austin School of Law. He has written and taught in the areas of environ-

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[2] *Amici* join this brief as individuals; their institutions are set forth for purposes of identification only.

mental law and preemption, including as they relate to CERCLA.

Sidney A. Shapiro is a University Distinguished Chair in Law at Wake Forest University School of Law. He has written and taught in the areas of environmental law, tort law, and preemption, including as they relate to CERCLA.

Rena I. Steinzor is a Professor of Law at the University of Maryland School of Law. She has written and taught in the areas of environmental regulation and environmental policy, including as they relate to CERCLA. She also previously litigated CERCLA cases while in private practice and served as staff counsel to the Subcommittee on Commerce, Transportation, and Tourism in the House of Representatives from 1983 to 1987, including the time at which that body was considering the 1986 amendments to CERCLA.

A. Dan Tarlock is a Distinguished Professor of Law and the Director of the Program in Environmental and Energy Law at the Illinois Institute of Technology Chicago-Kent College of Law. He has written and taught in the areas of environmental policy, natural resources, and international environmental law, including as they relate to CERCLA.

SUMMARY OF ARGUMENT

Congress passed 42 U.S.C. § 9658 as part of CERCLA to enable plaintiffs who were injured by acts of environmental contamination to seek relief against defendants who released toxic chemicals into the environment, even though the plaintiffs might not know that they were injured – and indeed might not *be* injured – until many years after the chemicals' release. Respondents (collectively, "Waldburger") ably show why the text, history, and purpose of CERCLA compel the conclusion that Congress meant § 9658 to superimpose a federally required commencement date on all time limits to bring suit imposed by state law – including the subcategory of time limits that courts sometimes refer to as "statutes of repose."

This brief addresses and amplifies one point in support of Waldburger's position: when Congress passed CERCLA in 1986 – and indeed continuing to the present day – the term "statute of limitations" was often used in a broad sense that encompasses "repose" periods such as the one at issue here. Petitioner CTS Corp. ("CTS") argues that, by 1986, the term "statute of limitations" had become a term of art with a limited, narrow meaning that did not include statutes of repose. But an examination of the ways in which Congress, the courts, and commentators have used and defined the terms "statute of limitations" and "statute of repose" shows that CTS's terminological argument is wrong.

I. This Court has often and recently used the term "statute of limitations" in a broad sense that easily includes the 10-year period in N.C. General Statutes § 1-52(16), the time limit at issue here. That term encompasses any statute that "estab-

lish[es] the period of time within which a claimant must bring an action," *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013), which is just what § 1-52(16) does. Although most limitations periods begin to run no earlier than a potential plaintiff can bring an action – that is, when the cause of action accrues – CTS errs when it claims that "accrual" is part of the definition of a statute of limitations. This Court has recognized in *Heimeshoff* and in other cases that there is a presumption that limitations periods begin to run at the time of accrual, but that is not an invariable rule. When a time period does not follow that rule, it is still a statute of limitations so long as it is designed to promote the goal generally served by such periods: "certainty and repose" for defendants. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014).

II. The term "statute of repose" has a number of meanings. As an initial matter, Congress practically never uses the term at all. The current U.S. Code contains no reference to any "statute of repose" or "repose period," and only one uncodified law contains any such reference. That is so even though Congress has created numerous time periods that fit CTS's description of a statute of repose. Congress simply has not used CTS's preferred label.

As for the courts, their use of the term has evolved over time. This Court's older cases, which contain the large majority of its uses of the term "statute of repose," use it simply to mean any statute that serves the policy of repose, including any statute of limitations. The term began to acquire an additional, specialized meaning in the 1970s and 1980s, referring specifically to the type of period at issue here – a period that runs from some independent

event rather than from the accrual of a cause of action, and that is distinguished from a traditional statute of limitations. Contrary to CTS's assertions, however, those narrower meanings are not and never have been exclusive for either "statute of limitations" or "statute of repose." Instead, this Court and other courts have continued to use both terms in their older, broader senses, and have recognized their overlapping and interchangeable definitions.

III. Examples from the U.S. Code further show that Congress and this Court can and often do describe a "statute of repose" (using the narrow definition of that phrase) as a "statute of limitations," a "limitations period," or a measure for the "limitation of actions." Congress has created time periods that fit the narrow "repose" definition in the varying contexts of securities law, aviation tort claims, the Employee Retirement Income Security Act of 1974, the Fair Housing Act, and the Vaccine Act. In some instances, Congress even indicated in the legislative history that it intended to create a "statute of repose." In every instance, however, Congress used "limitations" language in the statute itself; and, in several instances in the securities context, this Court has likewise used the term "statute of limitations" to describe a "repose" period.

In sum, the terminological distinction that CTS seeks to draw cannot withstand scrutiny. There is no reason to think that Congress would have referred specifically to a "statute of repose" in CERCLA to show its intent to preempt N.C. General Statutes § 1-52(16) and similar statutory time periods. On the contrary, there is every reason to think it would have considered such periods as within the accepted, broad definition of a "statute of limitations."

ARGUMENT

The phrases "statute of limitations" and "limitations period" were in 1986 and are today commonly used to refer to a broad range of time limitations to bring suit, including the particular category of limitations period sometimes called a "statute of repose." CTS's arguments in this case rest on the contrary, erroneous premise that there is a "fundamental difference" between a "statute of limitations" and a "statute of repose," so that, "[a]t the time Congress enacted § 9658 in 1986, the phrase 'statute of limitations' was a recognized term of art that did not encompass statutes of repose." Pet. Br. 21, 28. This brief supplements Waldburger's persuasive showing, *see* Resp Br. 23-28, that CTS is incorrect. The rigid terminological distinction portrayed by CTS does not even exist today. At the very least, no such distinction was clearly established when Congress enacted CERCLA.

I. THE TERMS "STATUTE OF LIMITATIONS" AND "LIMITATIONS PERIOD" HAVE A BROAD GENERAL MEANING

Courts generally use the phrase "[s]tatute[] of limitations" to refer to a law that "establish[es] the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013); *see Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Heimeshoff*); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) ("[A] typical statute of limitations provide[s] that a cause of action may or must be brought within a certain period of time."). Statutes of limitations "characteristically embody a 'policy of repose, designed to protect defendants,'" *Lozano*, 134 S. Ct. at 1234 (quoting *Burnett v. New York Cent.*

R.R. Co., 380 U.S. 424, 428 (1965)), and promote "'certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities,'" *id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

That general definition of a "statute of limitations" has been in use for more than a century. *See, e.g.*, *Levy v. Stewart*, 78 U.S. (11 Wall.) 244, 249 (1871) (explaining that "[s]tatutes of limitations . . . proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period"); 1 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 1, at 2-3 (4th ed. 1916) ("[S]tatutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are . . . statutes of limitation."), *quoted in Beach*, 523 U.S. at 416.

CTS asserts that it is a defining characteristic of a "statute of limitations" that it begins to run "'on the date when the claim accrued.'" Pet. Br. 21 (quoting *Black's Law Dictionary* 1546 (9th Cir. 2009)). This Court's cases say otherwise. True, there is a default presumption that a "limitations period commences when the plaintiff has a complete and present cause of action," which is also referred to as the time that the cause of action "accrues." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005) (internal quotation marks omitted). The presumption, however, is only a presumption and can be overcome by evidence of contrary legislative intent. *See Heimeshoff*, 134 S. Ct. at 610-11 ("[W]e have recognized that statutes of limitations do not inexorably commence upon accrual."). This Court has never suggested that a statute of limitations ceases to be a statute of limitations merely

because it is triggered by some event other than the accrual of a cause of action.

On the contrary, when this Court has needed to determine as a matter of federal law whether a particular time period should be treated as a "statute of limitations," it has asked whether that period "'serves the same "basic policies [furthered by] all limitations provisions"'" – that is, "certainty and repose." *Lozano*, 134 S. Ct. at 1234 (quoting *Young v. United States*, 535 U.S. 43, 47 (2002), in turn quoting *Rotella*, 528 U.S. at 555) (alteration in *Lozano*). The fact that the North Carolina statute at issue here has special features intended to make it more protective of those basic policies thus merely underscores that it is a type of statute of limitations.

II. THE TERM "STATUTE OF REPOSE" HAS MULTIPLE MEANINGS THAT HAVE EVOLVED OVER TIME

Congress itself has never used the term "statute of repose" in legislation. The word "repose" appears in only one subsection of the entire U.S. Code, and that appearance has nothing to do with the timeliness of suit.[3] Only one uncodified law, enacted in 1992, refers to a "period of limitation or repose," Act of Aug. 11, 1992, Pub. L. No. 102-339, § 3, 106 Stat. 869, 869-70 (suspending such periods for certain Indian land claims), and it does so in a section headed "Statute of Limitation," which suggests that Congress in 1992 thought the overall heading encompassed the repose

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[3] *See* 30 U.S.C. § 1265(b)(3) (referring twice to the "angle of repose," an engineering term). The statement in text reflects a search of the WestlawNext database "United States Code Unannotated" conducted on March 27, 2014. *See also McDonald v. Sun Oil Co.*, 548 F.3d 774, 784 (9th Cir. 2008) (reporting an identical result from a similar search).

periods affected by its legislation.[4] Notably, all this is true even though Congress has enacted numerous statutes that this Court and other courts have characterized as statutes or periods of "repose." *See infra* Part III (discussing examples).

Courts and commentators use the phrase "statute of repose" in a number of different ways, and legal and scholarly usage has changed over time. This Court has most often used the phrase in its older cases to refer to a statute that promotes the policy of repose. *See, e.g., Shipp v. Miller's Heirs*, 15 U.S. (2 Wheat.) 316, 324 (1817) (Story, J.) ("The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights, and shutting out stale and fraudulent claims.").[5] In this general, normative sense, there is no distinction between a statute of "repose" and one of "limitations." The Court and its members continued to use the term "statute of repose" in this way in the 1970s and 1980s with some regularity, *see, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 659, 663 (1987) (describing the application of a "2-year statute [of limitations]" to a claim under 42 U.S.C. § 1981 as

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[4] The statement in text reflects searches of the WestlawNext databases "Statutes at Large," "U.S. Public Laws," and "U.S. Public Laws – Historical," all conducted on March 27, 2014. *See also In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 900 F. Supp. 2d 1055, 1065 (C.D. Cal. 2012) (reporting an identical result from a similar search).

[5] *See also, e.g., Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time."); *United States v. Wiley*, 78 U.S. (11 Wall.) 508, 513 (1871) ("Statutes of limitations are indeed statutes of repose.").

"consistent with . . . the general purposes of statutes of repose"),[6] and it has done so as recently as 2007, *see Wallace v. Kato*, 549 U.S. 384, 391 (2007) (describing a two-year statute of limitations as a "supposed statute of repose").

The general, broad definition of the term "statute of repose" coexists with several technical, narrower definitions. Those definitions arose primarily from late-twentieth-century efforts to reform state tort law by imposing stricter time limits on the ability of plaintiffs to bring actions. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 587-88 (1980-81) ("McGovern") (describing the passage of "statutes of repose" to benefit architects, contractors, doctors, and product manufacturers). The purpose of the new "repose" periods was to cut off after a certain period the possibility of liability even though some plaintiffs would have individually persuasive reasons for not having brought suit earlier – such as not having known of their injury, or even never having been injured at all, before the cut-off date.

The use of the term "statute of repose" to describe those innovations in state law led to considerable linguistic confusion. As of 1981, one commentator surveying the field observed five different views of

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[6] *See also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (describing the purposes of "[s]tatutes of limitations" and adding that "[t]hese enactments are statutes of repose"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 334 (1978) (quoting a lower court's description of § 5(i) of the Clayton Act, 15 U.S.C. § 16(i)); *Jones v. Thomas*, 491 U.S. 376, 392 (1989) (Scalia, J., dissenting) ("[T]he Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings.").

the relationship between a statute of "limitation" and one of "repose":

> In the most general sense, a statute of repose and a statute of limitation are identical – "legislative enactments [that] prescribe the periods within which actions may be brought." . . . A second definition suggests that a statute of repose is a general term that encompasses various statutes, including statutes of limitation. . . . A third approach indicates that a statute of repose is merely one type of statute of limitation. . . . The fourth definition holds that a statute of repose is distinct from a statute of limitation because it begins to run at a time unrelated to the traditional accrual of the cause of action. . . . A fifth definition of "statute of repose" has been found in the "useful safe life" provisions of product liability statutes.

Id. at 582-86 (footnote omitted). The article goes on to use N.C. General Statutes § 1-52(16) – the statute at issue in this case – as an illustration of the third category: a statute of repose that is "merely one type of statute of limitation." *Id.* at 583.[7] A 1991 edition of a leading treatise on limitations principles set forth the same five definitions. *See* I Calvin W. Corman, *Limitation of Actions* § 1.3.2.1, at 30-31 (2d ed. 1991) ("Corman") (summarizing and incorporating

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[7] *See* McGovern, 30 Am. U. L. Rev. at 583-84 (describing the situation in which "a statute of repose is the portion of a statute of limitation that places a cap or outer limit on a statute that begins to run when a party discovers the existence of an injury or a cause of action," and citing examples including § 1-52(16)); *see also* I Corman § 1.3.2.1, at 30 (adopting a similar "cap or outer limit" definition).

McGovern's "[f]ive definitions").[8] CTS's discussion of the issue cites sources that focus on the fourth definition noted by the McGovern article. *See* Pet. Br. 29-33. CTS ignores, however, the substantial contrary evidence showing that the fourth definition was not the only one (and not even necessarily the most commonly used one) in 1986.

This Court and its members have used the terms "statute of repose" or "period of repose" in the narrow sense invoked by CTS in only a small number of cases, all decided after 1990. *See Credit Suisse*, 132 S. Ct. at 1419, 1421 (using "statute of repose" in summarizing an argument the Court did not reach); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (plurality) (referring in passing to "suit[s] . . . barred . . . by statutes of limitation or repose"); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (referring to the three-year period established by 15 U.S.C. § 77m as a "period of repose inconsistent with tolling").[9] Further, in *Lampf* – its most extensive discussion of any repose period to date – the Court also called the same three-year period "a portion of a[] . . . statute of limitations," 501 U.S. at 362 n.8, dispelling any suggestion that it might have meant to adopt the sort of rigid taxonomy for which CTS advocates. *See infra* p. 18.

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[8] This Court has previously relied on the Corman treatise as an authority on limitations issues. *See, e.g., Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (citing Corman with approval); *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010) (same); *Wallace*, 549 U.S. at 391 (same).

[9] *See also Stogner v. California*, 539 U.S. 607, 652 (2003) (Kennedy, J., dissenting) (discussing certain state laws that "toll . . . limitations periods for minors . . . even when the tolling conflicts with statutes of repose").

Lower courts have recognized that the terms "statute of limitation" and "statute of repose" often are and have been used in interchangeable or overlapping ways. In the circuit split that led this Court to take this case, both the Fourth and Ninth Circuits took that view. *See McDonald*, 548 F.3d at 781 & nn.3-4 (collecting cases and articles); *see also* Pet. App. 13a (following *McDonald*'s "historical analysis") (internal quotations marks omitted). The Second and Tenth Circuits reached the same conclusion in another recent pair of cases that interpreted the phrase "statute of limitations" as used in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and in the Housing and Economic Recovery Act of 2008. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 142-43 (2d Cir. 2013) ("[a]lthough statutes of limitations and statutes of repose are distinct in theory, the courts – including the Supreme Court and this Court – have long used the term 'statute of limitations' to refer to statutes of repose"); *NCUA v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) (noting "abundant examples of cases that use the term 'statute of limitations' in the broad, generic sense and often treat statutes of repose as a subcategory"), *petition for cert. pending*, No. 13-576 (U.S. filed Nov. 8, 2013).

The same point is further supported by a number of other circuit cases making similar observations – some in the 1980s and 1990s, but others more recently. Such cases include *Wike v. Vertrue, Inc.*, 566 F.3d 590 (6th Cir. 2009), which noted that courts "sometimes distinguish" statutes of limitations and repose but also "often employ these terms as synonyms," *id.* at 595; *Caviness v. DeRand Resources Corp.*, 983 F.2d 1295 (4th Cir. 1993), which described "a statute

of repose [as] a subspecies" of the general category of "statutes of limitations," *id.* at 1300 n.7; *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991), which, after distinguishing between statutes of "repose" and of "limitations," noted that "[b]oth types of statutes are often referred to as statutes of limitations," *id.* at 1218 n.2; and *Hatfield v. Bishop Clarkson Memorial Hospital*, 679 F.2d 1258 (8th Cir. 1982), which rejected the notion that there is any "sharp distinction between 'statutes of limitations' and 'statutes of repose,'" *id.* at 1263.[10]

Two state supreme courts have made similar observations. *See Barrett v. Montesano*, 849 A.2d 839, 845 (Conn. 2004) ("[T]his court often has used the term 'statute of limitations' to refer to other statutes that technically function more like statutes of repose."); *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 628 N.W.2d 893, 907 n.16 (Wis. 2001) ("[T]he terms 'statute of repose' and 'statute of limitations' have long been two of the most confusing and interchangeably used terms in the law."). Both *Barrett* and *Landis* further noted that, even though some *courts* observe a careful distinction between repose and limitation periods, it is rare for *legislatures* to do so. *See Barrett*, 849 A.2d at 845-46 (noting the Connecticut "legislature's repeated apparent use of

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[10] Even courts that have endorsed a firm *conceptual* distinction between limitations and repose periods have acknowledged that the *terms* often are used interchangeably. *See, e.g., Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005) ("the distinction between statutes of limitations and statutes of repose is often blurred"); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1434 n.17 ("Although the two concepts differ, the terminology has become interchangeable."), *amended on denial of reh'g*, 947 F.2d 897 (10th Cir. 1991), *vacated on other grounds, Dennler v. Trippet*, 503 U.S. 978 (1992).

the phrase 'statute of limitations' as also encompassing a statute of repose"); *Landis*, 628 N.W.2d at 907 ("[T]he legislature has not used the words 'repose,' 'statute of repose,' or 'statutes of repose' in the text of *any* statute in force. It is apparent that the phrase 'statute of repose' is judicial terminology and is not featured in legislative lingo."). That is true in the federal system as well, and it is all the more reason that this Court should not draw any inference from the fact that Congress did not use the particular word "repose" in CERCLA.

III. CONGRESS AND THE COURTS OFTEN DESCRIBE "REPOSE" PERIODS USING "LIMITATIONS" LANGUAGE

Numerous specific examples illustrate the general point that neither Congress nor this Court has ever adopted the rigid terminological distinction for which CTS argues in its brief. On the contrary, there are quite a few situations in which one or more of Congress, this Court, and the lower federal courts have referred to the same statutory time period as a statute or period of "limitations" and a statute or period of "repose."

A. Securities Law: 15 U.S.C. § 77m, 28 U.S.C. § 1658(b)

Perhaps the most prominent example of a federal statute structurally similar to N.C. General Statutes § 1-52(16) can be found in the three-year period created by 15 U.S.C. § 77m and the analogous five-year period created by 28 U.S.C. § 1658(b). These periods govern claims for fraud and other misrepresentations or omissions under federal securities law. Both statutes create a shorter period that runs from an investor's discovery of the claim and a longer period that runs from some act or omission of the

defendant. *See* 15 U.S.C. § 77m (one year after "discovery of [an] untrue statement or . . . omission" or of a "violation"; three years after "the security was bona fide offered to the public" or was sold); 28 U.S.C. § 1658(b) (two years after "discovery of the facts constituting the violation" or five years after the "violation" itself).

Both of these statutes meet the broad definition of a "statute of limitations" that this Court set forth most recently in *Lozano* and in *Heimeshoff*: they give a plaintiff a limited time to bring suit so as to provide securities defendants with certainty about their possible liability and repose after the statute has run. *See supra* Part I. But the three- and five-year periods contained within these statutes also meet the narrow definition of a "statute of repose" that CTS erroneously asserts had become clearly distinct from a statute of limitations by the time that CERCLA was enacted in 1986. Indeed, as already noted, this Court recognized in *Lampf* that the three-year period has the characteristics of a "period of repose" and stated that it would therefore not be subject to equitable tolling. 501 U.S. at 363; *see supra* p. 13.

Despite those repose-like characteristics, Congress and this Court have nevertheless referred to the three- and five-year periods of § 77m and § 1658(b) as statutes of limitations. Congress did so in their titles, which designate § 77m as a measure for the "[l]imitation of actions," § 77m, and § 1658(b) as a "statute of limitations for securities fraud," Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, tit. VIII, § 804, 116 Stat. 745, 800, 801. Section 1658(b) was enacted with that title in 2002, well after the time at which CTS incorrectly claims that a sharp distinction between limitations and repose terminology had already emerged.

This Court likewise referred in *Lampf* to the entire "1-and-3-year structure" that appears in § 77m as a statute of limitations. *See* 501 U.S. at 362 (describing that structure as the most "appropriate statute of limitations" for securities fraud claims); *id.* at 362 n.8 (referring to the three-year period as "a portion of an express statute of limitations"). It has done so as to both § 77m and § 1658(b) in other cases before and since. *See Merck*, 559 U.S. at 638 (referring to the 2-and-5-year structure of § 1658(b) as the "applicable statute of limitations"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (stating that *Lampf* "provides a uniform, national statute of limitations" for securities fraud actions); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976) ("Section 13 specifies a statute of limitations of one year . . . [but not] to exceed three years from the time of offer or sale").

This Court's repeated description of § 77m and § 1658(b) as statutes of limitations is particularly significant because of the structural similarity between the securities statutes and N.C. General Statutes § 1-52(16). All three provisions contain a shorter period with a discovery rule capped by a longer period running from the defendant's act or omission that caused harm – what has been "termed [a] 'bifurcated' or 'two-tier' statute[]." McGovern, 30 Am. U. L. Rev. at 584 (footnotes omitted). This Court thought it correct in 1976 (*Ernst*), in 1991 (*Lampf*), in 1995 (*Plaut*), and in 2010 (*Merck*) to call such a bifurcated framework a statute of limitations. That is enough to show that the broader meaning of that term not only was current in the 1980s and 1990s but also remains in use today.

B. General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat 1552 ("GARA"), *reprinted in* 49 U.S.C. § 40101 note, contains an 18-year time limit on certain actions for damages against certain aircraft manufacturers, a period it repeatedly describes as a "limitation period" and an "applicable limitation period." *Id.* §§ 2(a)(1), 2(a)(2), 3(3), 108 Stat. 1553. That 18-year period nevertheless shares the characteristics that CTS identifies with a repose period: it begins running from the delivery of the aircraft or a part of the aircraft, regardless of the date on which a particular plaintiff's cause of action based on any defect in that aircraft might accrue. Congress itself identified the period as a "statute of repose" in the legislative history, *e.g.*, H.R. Rep. No. 103-525(I), at 1, 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, and courts have adopted the same description, *see, e.g.*, *Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 337, 339 (6th Cir. 2013) ("period of repose"). GARA thus shows that Congress can and does use the phrase "applicable limitations period" – the same language that appears in CERCLA's § 9658(a)(1) and § 9658(b)(2) – when it consciously means to refer to a repose period.

C. ERISA: 29 U.S.C. § 1113(1)

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), contains a six-year period after which "[n]o action may be commenced" for a breach of fiduciary duty. *Id.* § 1113. The six-year period runs from either "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could

have cured the breach or violation." *Id.* § 1113(1). Congress gave this period the title "[l]imitation of actions," *id.* § 1113, and referred to it in the legislative history as a "statute of limitations."[11] In *Heimeshoff*, this Court also called § 1113 as a whole a "statute of limitations." 134 S. Ct. at 613. As the Fourth Circuit recently noted, however, § 1113(1) meets the narrow definition of a "statute of repose" because it "begins immediately upon 'the last action which constituted a part of the breach or violation'" – regardless of "'whether any injury has resulted.'" *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013) (citation omitted).

D. Fair Housing Act: 42 U.S.C. § 3613(a)(1)(A)

The Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"), contains a two-year period for claims based on a "discriminatory housing practice" that runs from "the occurrence or the termination of . . . [that] practice." *Id.* § 3613(a)(1)(A). In *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008) (en banc) (Kozinski, J.), the court of appeals held that, in the case of a building that violates the FHA's disability-access requirements, this period can run out before a particular plaintiff is even injured for the violation and even has the opportunity to sue. *See id.* at 463. So construed, the period effectively became a "statute of repose" as CTS uses the term – a point that was highlighted by the dissent. *See id.* at 468 (Fisher, J., dissenting). The majority, however, continued to refer to the period as a "statute of limitations" and a

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[11] *See* H.R. 10470, 93d Cong. § 698, 1974 WL 186653, at *110 (1973) (earlier version of the bill titling a similar section as "statute of limitations"); S. Rep. No. 93-127, at 47 (1973), 1974 U.S.C.C.A.N. 4838, 4882 (referring to predecessor provision as "statute of limitations").

"limitations period" throughout its opinion. *See id.* at 459-61, 463.

E. Vaccine Act: 42 U.S.C. § 300aa-16(a)(1)

The Vaccine Act, 42 U.S.C. § 300a-1 *et seq.*, contains a 28-month time limit for claims under the National Vaccine Injury Compensation Program. *See id.* § 300aa-16(a)(1). The period bars any petition for compensation based on a vaccine "administered before [the effective date of this title]" that is "filed . . . after the expiration of 28 months after [the effective date of this title]." *Id.* Congress gave this period the title of "[l]imitation of actions," *see id.* § 300a-16, but courts have called it a "statute of repose," in part because the date it sets bears "no relation to the date . . . on which the . . . claim accrue[s]." *Weddel v. Secretary of Health & Human Servs.*, 100 F.3d 929, 932 (Fed. Cir. 1996). It is thus another example where a court considered the application of the "repose" label to be consistent with a legislative indication that a time period was a "[l]imitation" period.

* * *

In sum, CTS's terminological distinction between "limitations" and "repose" periods lacks grounding in the way that legislators or judges actually use those words. At the very least, CTS fails to establish that a clear distinction could be drawn in usage when CERCLA was established in 1986. As a result, CTS cannot show that, by using the terms "statute of limitations" and "limitations period" in CERCLA, Congress meant to leave intact "repose" periods such as the one created by N.C. General Statutes § 1-52(16). For the reasons persuasively set forth in Waldburger's brief, the better reading of CERCLA is that Congress meant to preempt such periods

and give victims of environmental contamination a reasonable opportunity to recover for their injuries.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted.

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CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization. NRDC and its members have a significant interest in remedying the health and environmental harms caused by hazardous waste contamination.

SUMMARY OF ARGUMENT

Congress enacted CERCLA Section 9658 in order to prevent plaintiffs harmed by hazardous waste contamination from being unfairly denied recovery as a result of state time limitations. Because these plaintiffs often do not discover the fact or scope of their injuries until many years after the contamination has occurred, their claims were vulnerable to state laws that bar recovery in much shorter periods of time. Congress's solution was to impose a uniform "discovery rule" for tort claims based on toxic contamination, which would allow plaintiffs to bring suit at the time that they knew or reasonably should have known that their injuries were the result of that contamination – thereby permitting plaintiffs who act diligently to seek recovery for latent harms

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[1] Pursuant to S. Ct. R. 37.6, counsel for *amicus* state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this *amicus curiae* brief by a blanket agreement filed with the Clerk of this Court. Respondents have consented to the filing of this *amicus curiae* brief by a consent letter that is being lodged with the Clerk of the Court.

that might otherwise be barred by earlier state limitations periods.

Section 9658 applies to both personal injury and property damages caused by hazardous waste contamination. Either form of harm may be concealed or dormant for long after a defendant causes contamination to occur; both the presence of toxic substances in soil or groundwater and the health effects that result from exposure to these substances are difficult to detect and may not manifest as injury for decades. However, Petitioner argues that Section 9658 does not apply to "statutes of repose," state time limitations on bringing suit that typically last 10 years from the last act or omission of a defendant. If the Court were to adopt Petitioner's position, injured plaintiffs who act promptly after discovering their injuries would not be able to pursue any claim for redress.

This was not the result that Congress intended. It is apparent from the text of Section 9658 and the accompanying legislative history that the statute ensures plaintiffs' ability to seek recovery for latent harms caused by toxic contamination after statutory periods of repose expire, if those periods are inconsistent with the discovery rule in the federal law. Section 9658 applies to all state limitations periods, however formulated.

ARGUMENT

I. Introduction

Congress enacted CERCLA Section 9658 to remedy a specific, identified problem: state limitations pe-

riods were preventing tort plaintiffs from seeking redress for latent contamination and associated personal injury and property damage. Specifically, state time limitations that expired before plaintiffs could discover their injuries had the effect of depriving plaintiffs of their cause of action before they knew it existed. Because harm from chemical contamination of property typically is not – and often cannot be – discovered until many years after the contamination occurs, Congress enacted Section 9658 to ensure that plaintiffs could seek a remedy for latent contamination injuries. Petitioner asks this Court to thwart this purpose by interpreting Section 9658 to allow state statutory "repose" periods to bar relief in such cases. Periods of repose set time limitations based on the date of the defendant's last act or omission, rather than the date that the plaintiff discovers an injury, and as a result may extinguish a plaintiff's cause of action before the plaintiff's injury becomes apparent.

According to Petitioner, Section 9658 applies "unambiguously" only to "statutes of limitation," which Petitioner distinguishes from statutory periods of repose. *See* Pet. Br. 20. Under Petitioner's theory, Congress's purpose for enacting Section 9658 is largely irrelevant to the question of how the statute should be read. Petitioner therefore endorses a reading that fails to address the singular problem that motivated Congress to enact Section 9658: state statutes that prevent plaintiffs from recovering for latent injuries.

The types of harm associated with toxic contamination – latent illnesses and concealed property damage – are commonly discovered decades after

contamination enters the environment. In contrast, periods of repose may bar claims brought 10 or fewer years following the defendant's last act or omission. Congress was aware of both of these facts when it enacted Section 9658. Thus, under Petitioner's preferred reading of Section 9658, Congress's solution for contamination plaintiffs whose claims were time-barred by state statutes was – "unambiguously" and by design – nothing more than a paper tiger, useless against state limitations that began on the date of the defendant's last act or omission. There is no evidence for this in either the statutory text or the legislative history. Rather, Congress intended Section 9658 to be effective against all contrary state limitations periods, however those limitations are styled. Congressional intent should not be so readily disregarded in interpreting the meaning of a statute. The latent harms associated with toxic contamination, precisely those injuries that Congress intended to address with Section 9658, confirm that Section 9658 must apply to all state limitations periods, including periods of repose.

II. Harm resulting from toxic contamination is often not discovered until many years after a defendant's last act or omission

A. Toxic contamination is a serious and continuing problem

When Congress enacted CERCLA in 1980, toxic contamination represented a new and serious threat, well-hidden and long-lasting. The Love Canal tragedy – in which chemicals buried at a dump site 25 years earlier leached up into a residential communi-

ty later built on the site – revealed that threats seemingly laid to rest could have unexpected consequences far into the future. A rash of congenital birth defects among children born to the Love Canal community hinted at another grim aspect of toxic contamination, that exposure to toxic substances could produce injuries not felt or realized until much later. The threat of other buried toxic sites loomed large; they were seen as "time bombs," numbering in the unknown hundreds across the nation. *See* Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 18 (1979).[2]

Today, the threat of toxic contamination in soil and groundwater remains a key environmental concern. In 2013, EPA added 18 new sites to the CERCLA National Priorities List (NPL). *See* 78 Fed. Reg. 31,417, 31,421 (May 24, 2013) (to be codified at 40 C.F.R. pt. 300); 78 Fed. Reg. 75,475, 75,478 (Dec. 12, 2013) (to be codified at 40 C.F.R. pt. 300). As of February 27, 2014, there are 1,319 sites on the NPL, compared to only 375 sites that have so far been remediated and removed from the list.[3] EPA, *National Priorities List (NPL)*, http://www.epa.gov/superfund/sites/npl. However, the NPL represents only the worst-contaminated sites. *See* EPA, *Frequent Questions about Superfund Redevelopment*, http://www.epa.gov/oerrpage/superfund/programs/recycle/faqs/index.html. The problem of toxic contamination is

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[2] *Available at* http://www2.epa.gov/aboutepa/love-canal-tragedy.

[3] A site is removed from the NPL if EPA determines that all appropriate response actions for the site have been implemented, or that the site poses no significant threat to public health or the environment. 40 C.F.R. § 300.425(e).

much, much larger. In 2004, EPA estimated that 217,000 new contamination sites requiring cleanup would be discovered in the following 30 years, based on historical trends. EPA, *Cleaning Up the Nation's Waste Sites: Markets and Technology Trends* 1-4 (2004)[4] [hereinafter *Cleaning Up the Nation's Waste Sites*]. While this figure includes new additions to the NPL, the vast majority will have to be remediated by other state or private programs. *Id.* There is presently no single information source that tracks the extent of contaminated land nationwide. EPA, *EPA's 2008 Report on the Environment* 4-49 (2008)[5] [hereinafter *Report on the Environment*].

Sites of toxic contamination are disproportionately located near low-income and minority populations. Krista Yacovone, *Brownfields and the Poor: Is Cleanup a Hazardous Waste of Time? An Analysis of the United States' Efforts at Remediation and Their Applicability to Brazil*, 35 FORDHAM INT'L L.J. 201, 215 (2011). Contamination can disproportionately impact vulnerable populations, including minorities, women, and children. *Id.* at 220. Environmental toxins may contribute to certain health conditions that are more prevalent among members of these populations. *Id.* at 220-21. For example, contaminants may aggravate osteoporosis, which is more common among women, as well as diabetes, chronic liver disease, cardiovascular disease, and chronic respiratory

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[4] *Available at* http://www.clu-in.org/download/market/2004market.pdf.

[5] *Available at* http://www.epa.gov/roe/docs/roe_final/EPAROE_FINAL_2008.PDF.

disease, to which certain minority populations are predisposed. *Id.* at 221.

Many toxic substances contribute to contamination. EPA and the Agency for Toxic Substances & Disease Registry (ATSDR)[6] maintain a Substance Priority List (SPL) of substances commonly found at CERCLA remediation sites, ranked by frequency of occurrence, toxicity, and potential for human exposure. *See* ATSDR, *Priority List of Hazardous Substances*, http://www.atsdr.cdc.gov/SPL [hereinafter *SPL*]. Currently, there are 275 substances on this list. *Id.* Among the highest-ranked substances are heavy metals, including arsenic, lead, mercury, and cadmium; volatile organic compounds (VOCs), including vinyl chloride, benzene, chloroform, and trichloroethylene (TCE); and persistent organic pollutants (POPs), including polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and the pesticide DDT. *Id.*

These substances may enter the ground from a variety of sources, including industrial and waste management facilities, mining operations, military bases, underground storage tanks, and agricultural land. *Report on the Environment*, *supra* at 4-43 box 4-1. Toxic substances may be deposited through accidental spills and leaks, or through illegal dumping. *Id.* Once in the ground, contamination can reach humans in many ways. Direct contact with contaminated soil, drinking contaminated surface or ground water, and breathing contaminated vapors or dust

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[6] ATSDR is an agency of the Department of Health and Human Services.

all expose people to toxic substances. *Id.* at 4-43. Toxic contamination in soil and groundwater can volatilize and enter homes and other buildings, in the process known as "vapor intrusion." *Id.*; *id.* at 3-26. Eating exposed plants or animals also exposes people to toxic contamination; some toxins that accumulate in fatty tissues in fact become more concentrated as they move up the food chain. *Id.* at 5-15.

Toxic contamination harms both humans and the environment. Exposure to toxic contamination is linked to a number of serious health effects, including various forms of cancer. U.S. Dep't of Health & Human Servs., *Report on Carcinogens, Twelfth Edition* (2011)[7] [hereinafter, *Report on Carcinogens*]. Even if a landowner suffers no health problems, she will likely suffer property damage as a result of the presence of contamination on her land. Either of these harms may not become apparent for many years after contamination, either because they are difficult to observe or discover or because they do not immediately manifest themselves as injury. *See* Susan M. Cooke, The Law of Hazardous Waste § 17.05[4] (Matthew Bender, 2014) (Lexis Advance) ("In addition, due to the long latency period of diseases associated with chemical exposure, as well as the covert nature of the property damage that typically results from contamination, often many years pass before the plaintiff discovers the injury and commences suit.").

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[7] *Available at* http://ntp.niehs.nih.gov/ntp/roc/twelfth/roc12.pdf.

B. Toxic contamination may not be discovered until years or decades after it enters the ground

That contamination in the ground is not always readily apparent is unsurprising – it is, in effect, "out of sight, out of mind." However, this simple explanation does not fully capture the problems associated with discovering toxic contamination in soil or groundwater. Contamination may date back to activities that occurred many years ago, of which there may be no other record than the contamination itself. Once toxic substances enter the ground, they can migrate slowly and in ways that are very difficult to trace. Contamination can be practically invisible even when it is close at hand, as when it appears at the surface of the ground or in drinking water. And contamination does not go away easily – substances can remain toxic for decades into the future, past the time in which state tort remedies traditionally expire.

Many of the toxic sites that are expected to be discovered or remediated in the future were contaminated decades in the past. For example, EPA estimates that between 9,000 and 90,000 inactive dry cleaning sites nationwide remain undiscovered, many of which closed in the 1980s or earlier.[8] *Cleaning Up the Nation's Waste Sites*, *supra* at 12-10. Tens of thousands of manufactured gas plants and related facilities that were decommissioned decades ago

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[8] The dry cleaning industry uses a variety of hazardous chemicals and solvents, including tetrachloroethylene (PCE) and TCE. *Cleaning Up the Nation's Waste Sites* at 12-2.

have still not yet been investigated for contamination.[9] *Id.* at 10-6. Of the more than 38,000 current and former military sites identified by the Department of Defense as contaminated or known or suspected to contain unexploded ordnance or munitions, over 9,000 have not yet been cleaned up, and over 7,000 have no remediation system in place.[10] U.S. Dep't of Def., *Fiscal Year 2012 Defense Environmental Programs Annual Report to Congress* 5 tbl. 3, 7 tbl. 5 (2013).[11] With heightened regulatory requirements for using and disposing of hazardous substances, toxic contamination is increasingly associated with practices that are no longer in use. With the exception of accidental spills and natural events, most land contamination is the result of historic activities. *Report on the Environment*, *supra* at 4-42.

Contamination can be considerably difficult to identify or locate. This is a primary reason that toxic contamination remains a problem so long after the events or activities that caused it have ceased. Unlike most other property hazards, toxic contamination in soil or groundwater is not usually readily apparent to a purchaser or user of land. Often, toxic contaminants have no odor, taste, or color. For example, dangerous levels of arsenic, lead, and vinyl

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[9] These facilities generated coal tar and other oil byproduct contaminants, including PAHs. *Cleaning Up the Nation's Waste Sites*, *supra* at 10-9.

[10] Department of Defense contamination sites may contain many different forms of contamination, including petroleum products, solvents, heavy metals, and PCBs. *See Cleaning Up the Nation's Waste Sites*, *supra* at 6-1.

[11] *Available at* http://www.denix.osd.mil/arc/loader.cfm?csModule=security/getfile&pageid=36957.

chloride cannot be seen or tasted in groundwater.[12] Private well owners may be subject to minimal or no testing requirements, and thus may not realize that their groundwater is contaminated. EPA, *Recommendations from the EPA Ground Water Task Force: A Report by the Ground Water Task Force* B-5 (2007)[13] [hereinafter, *Task Force Recommendations*]. Contaminants can travel underground from adjacent properties, and even visible signs of surface contamination can escape diligent inspection, especially where property is densely vegetated. Arthur E. Rhoades, *Damage to Real Property: The Lay of the Land*, 75-OCT J. KAN. B.A. 6, 6 (2006). As a result of these difficulties, landowners are often unaware of the presence of contamination on their property. EPA, *Superfund Enforcement: Success in Enhancing Fairness and Expediting Settlements*, http://www.epa.gov/superfund/accomp/17yrrept/report3.htm.

Some forms of toxic contamination are especially difficult to discover. For example, certain toxic contaminants known as "dense nonaqueous phase liquids" (DNAPLs)[14] can be particularly difficult to de-

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[12] *See* ATSDR, *Public Health Statement: Arsenic* (2007), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp2-c1-b.pdf; ATSDR, *Public Health Statement: Lead* (2007), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp13-c1-b.pdf; ATSDR, *Public Health Statement: Vinyl Chloride* (2006), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp20-c1-b.pdf. Each of these substances is among the top five on the SPL. *See SPL.*

[13] *Available at* http://www.epa.gov/superfund/health/conmedia/gwdocs/pdfs/gwtf_report_coverletter.pdf.

[14] TCE, PCE, PCBs, PAHs, and coal tar are all common examples of DNAPLs. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2, 14-3 exhibit 14-1.

tect, trace, and remediate. DNAPLs are colorless, so they are rarely directly observed at contamination sites. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2. They are heavier than water, and only slightly soluble in water, which means that they can penetrate soil to well below groundwater levels. *Id.* at 14-1 to 14-2. DNAPLs migrate in thin, winding trails through pores and fractures in the ground, pooling and spreading laterally at less permeable layers, making their distribution difficult to determine. *Id.* at 14-2. DNAPLs move through soil independently of groundwater – and sometimes even in a different direction – meaning that their migration cannot be accurately predicted by groundwater analysis. EPA, *Ground Water Issue: Dense Nonaqueous Phase Liquids* 12 (1991).[15] DNAPLs can cause health and ecological risks at concentrations as low as a few to hundreds of parts per billion. EPA, *Dense Nonaqueous Phase Liquids (DNAPLs): Overview*, http://cluin.org/DNAPL. EPA estimates that DNAPLs are likely to appear at 29 to 45 percent of NPL sites, as well as tens of thousands of other contaminated areas nationwide. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-7 to 14-8.

Other factors prolong the time between ground contamination and discovery. Unlike air or surface water pollution, which spread relatively quickly through the environment, contamination in soil or groundwater may migrate very slowly. Thus, even if a landowner is aware of or suspects contamination on nearby properties, this contamination may not ac-

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[15] *Available at* epa.gov/superfund/remedytech/tsp/download/issue8.pdf.

tually reach the landowner's property until years later. Cooke, *supra* at § 17.04[1]. Contamination that has lain dormant for many years may migrate suddenly, as a result of changes in the surrounding earth. Activities like mining or construction can remove natural barriers to toxic pollutants, allowing them to travel into areas that were not previously contaminated. *Task Force Recommendations*, *supra* at B-5.

Of course, historic contamination would not be a problem if toxic substances broke down into nontoxic components soon after entering the ground. Unfortunately, this is generally not the case. Certain classes of contaminant are especially long-lasting. For example, DNAPLs' low solubility means that they can continue releasing small but environmentally critical amounts of contamination into groundwater for very long periods of time. *Cleaning Up the Nation's Waste Sites*, *supra* at 14-2. Similarly, heavy metals do not break down from their elemental form, and therefore persist in the environment. Air Pollution Information System (APIS), *Heavy Metals*, http://www.apis.ac.uk/overview/pollutants/overview_HM.htm. POPs remain toxic for decades or longer. *Report on the Environment*, *supra* at 5-15.

C. The health effects associated with exposure to toxic contamination may not be felt until long after a plaintiff has been exposed

Just as the presence of toxic contamination may remain undetected for long after contaminating substances are deposited into ground, the health effects

of exposure to these substances may not be observed or felt for years after the exposure occurs. Exposure to toxic contamination has been linked to numerous serious human health risks. These include both health effects that are felt immediately, and latent harms which may not be perceived until some time after exposure. With many substances and exposures, it is possible to suffer health problems only years or decades after exposure, with no prior indication of harm in the meantime. As a result, a person harmed by toxic substances might not experience any symptoms until long after state limitations periods that are defined by exposure or the actions of a defendant have expired.

Cancer is the most prominent latent health impact of toxic substances. "Cancer" refers to a group of over 200 different diseases, all of which involve an uncontrolled growth and spread of abnormal cells in the body. ATSDR, *Cancer Fact Sheet*, http://www.atsdr.cdc.gov/COM/cancer-fs.html. Cancer is most common and deadliest in the prostate, breast, lung and bronchus, and colorectum. *Report on Carcinogens*, *supra* at 5. Other forms that have recently increased in incidence include cancers of the kidney, esophagus, liver, thyroid, pancreas, and bladder, as well as cancerous melanoma (in skin), leukemia (in blood or bone marrow), myeloma (in plasma cells and bone marrow), and non-Hodgkin's lymphoma (in blood). *Id.* at 6. Children – who as a population are particularly vulnerable to environmental exposures – most commonly experience leukemia and brain cancer. *Id.*

The Department of Health and Human Services has identified 240 substances and substance classes

that are either known or reasonably anticipated to cause cancer in humans. *See Report on Carcinogens, supra.* This list includes many of the substances featured on the SPL.[16] Some substances and exposure circumstances may cause cancer only by repeated or long-term contact, while others can cause cancer after brief exposure. *Id.* at 3. The first sign of cancer often does not appear until 20 to 30 years or more after exposure to a cancer-causing substance. *Id.* at 4.

Although cancer is the most common latent illness associated with exposure to toxic contamination, other latent health impacts have also been linked to toxic substances. For example, childhood lead poisoning has been associated with effects felt in adulthood, including kidney disease and high blood pressure. ATSDR, *Case Studies in Environmental Medicine (CSEM): Lead Toxicity* 33, 35 (2010).[17] Exposure to lead may also cause health problems that are not immediately apparent, such as cognitive and reproductive impairment. *Id.* at 32. Onset of neurological symptoms of mercury poisoning has been observed up to 10 years from initial exposures. *See* Steve Smith, *Ecological and Health Effects of Chemical Pollution, in* AN INTRODUCTION TO POLLUTION SCIENCE 242 (Roy M. Harrison ed., 2006).

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[16] Almost all of the top-ranked substances on the SPL are either known or reasonably anticipated to cause cancer in humans. Mercury, white phosphorus, and hexachlorobutadiene are the only substances in the top 20 which do not appear on the DHHS list. *See SPL, supra; Report on Carcinogens, supra.*

[17] *Available at* http://www.atsdr.cdc.gov/csem/lead/docs/lead.pdf.

III. Section 9658 establishes a uniform discovery rule for state tort actions arising from hazardous waste contamination that supersedes more restrictive state limitations periods

Section 9658 serves its fundamental purpose by overriding state limitations periods, including periods of repose. The purpose and effect of Section 9658 was to impose a federally-uniform "discovery rule" on state tort actions based on toxic contamination, in recognition of the latent nature of injuries to people and property from such contamination. State limitations periods that are defined either by exposure or by the actions of a defendant (rather than by the date of discovery) present exactly the issue that Congress addressed through Section 9658. Moreover, existing state-law repose periods provide – without exception – for limitations periods that are far shorter than the typical latency period for cancer and other diseases associated with toxic contamination, and far shorter than the time after which a landowner might reasonably first discover migration of contamination onto her property. Congress would not and did not enact Section 9658 to allow tort recovery for latent injuries to people and property only if the latency period was unrealistically short, nor did it intend to preserve periods of repose as a loophole to Section 9658's discovery rule.

A. The text and legislative history of Section 9658 demonstrate that Congress intended to impose a federally-uniform "discovery

rule" on state tort remedies for toxic contamination

When it enacted Section 9658, Congress's purpose was clear: to ensure plaintiffs' access to state court remedies for latent harms from toxic contamination, by imposing a uniform federal "discovery rule" to replace a patchwork of state limitations periods governing these state tort claims. Congress enacted Section 9658 against a backdrop of concern about whether state remedies were adequate to address tort claims that CERCLA itself did not address. Both the text and the legislative history of Section 9658 bear this out. Allowing a defendant to evade preemption simply by availing itself of a law with a different form – but with the same effect of barring a plaintiff's claim before she even would have reason to know of its existence – would prevent Section 9658 from fulfilling its fundamental purpose. Thus, Section 9658 must preempt state limitations periods based on the date of a defendant's last act or omission. The law would not fulfill its basic purpose – indeed, would not make sense in implementation – if courts were to interpret it not to bar repose periods that would cut off tort causes of action based on toxic contamination before the injured individual or property owner was aware of injury or, indeed, had yet been injured at all.

CERCLA's main focus is on allocating responsibility for costs of investigating and remediating toxic sites. CERCLA does not include any provision to either replace or enhance existing state-law tort remedies, beyond the statute's strict liability for costs of investigation and remediation – so, for example,

state tort law still governs plaintiffs' remedies for claims for loss of property value or for personal injury from contamination. But Congress was nonetheless concerned, when it adopted CERCLA, about the adequacy of state-law remedies, and thus Section 301(e) of CERCLA called for a study group composed of lawyers from different organizations to conduct a study "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." 42 U.S.C. § 9651(e).

The study group completed its report, and among the issues addressed in the study was the question of whether and how state-law limitations periods affected plaintiffs' access to tort remedies. The Study Group Report was particularly concerned about the prospect of state limitations periods – including "statutes of repose" – barring plaintiffs' state tort claims before they would be aware of the existence of those claims, because of latency of contamination-related harms. The Report noted:

> A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the traditional or the discovery rule. Since many of the hazardous wastes are carcinogens, mutagens, teratogens or substances with delayed impact on different organs or the central nervous system, the latency period for

> the appearance of injury or disease is likely to be extended for 30 years or more. In states that have not clearly adopted the discovery rule (i.e., that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease) the cause of action will usually be time barred when the plaintiff discovers his hurt. The Study Group recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one.

Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies pt. 1, at 255-56 (Comm. Print 1982).

While the Study Group Report's recommendation was explicitly aimed at states, Congress evidently concluded that without federal action, the problem that it identified would continue to bar plaintiffs' claims inappropriately. The Study Group Report clearly framed this "problem" as a function of when a limitations period begins to run, rather than the number of years it runs, the language used to ex-

press the limitation, or any other factor. *Id.* at 43; H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354; 42 U.S.C. § 9651(e)(1).

In amending CERCLA in 1986, Congress addressed many contamination-related issues identified or further studied since the passage of CERCLA. With the enactment of Section 9658, Congress specifically intended to "address[] the problem identified in the 301(e) study"; namely, that "certain State statutes deprive plaintiffs of their day in court" by enacting time limitations based on the time of the plaintiff's first injury or exposure, or the time of a defendant's acts or omissions, rather than the time that the plaintiff discovers the injury. *See* H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

This intent is embodied in the plain language of the statute. First, Section 9658 refers to the commencement date established through the federal statute as the "federally required commencement date" – plainly a statement that states are required to use this date, and not some other date, as the commencement date for limitation of actions.[18] 42 U.S.C. § 9658(a)(1). This phrase is used throughout Section 9658 to describe the federal requirement.

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[18] Section 9658 defines "federally required commencement date" as, ordinarily, "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A).

Second, the reference in Section 9658 to "common law" limitations periods, in addition to statutes, makes plain that the specific form in which a state chooses to express a limitations period is not relevant to the scope of preemption under the law. *Id.* It defies logic to speculate that Congress would have intended to preempt all common-law-based limitations periods, but only a specific subset of statutorily-designated limitations periods. There is no sign in either the statute itself or the accompanying legislative history that Congress intended to preserve any form of state limitations period that would prevent plaintiffs from bringing suits before they could discover their injuries. Rather, it is apparent that Congress meant to preempt all state limitations periods that would expire prior to the federally required commencement date.

Finally, Section 9658's "special rule" for minor plaintiffs provides further textual evidence of Congress's intent. Where the injured party is a minor, Section 9658 extends the commencement of any limitations period – the "federally required commencement date" – to the later of the date of discovery or "the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed." 42 U.S.C. § 9658(b)(4)(B)(i). By contrast, a typical 10-year repose period would bar a tort action by a victim exposed to contamination as a young child before the child reaches the age of majority. In this context, reading the statute not to preempt periods of repose would violate Congress's clear mandate to protect children's right to bring an action after they reach majority age, through the application of a uniform federal rule. The only way for

this provision of Section 9658 to have meaning is for the federally-required commencement date to preempt all contrary state limitations periods, however those limitations are styled. If this were not the case, this "special rule for minors" would be wholly inoperative in any state in which a state limitations period was not preempted.

Beyond the plain text of the statute, the legislative history confirms Congress's intent to solve the problem identified in the Study Group Report. The Conference Report on Section 9658 explained clearly how Section 9658 accomplishes this goal:

> While State law is generally applicable regarding actions brought under State law for personal injury, or property damage, which are caused or contributed to by exposure to any hazardous substances, or pollutant or contaminant, released into the environment from a facility, a Federally-required commencement date for the running of State statutes of limitations is established. This date is the date the plaintiff knew, or reasonably should have known, that the personal injury referred to above was caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

See H.R. Conf. Rep. No. 99-962, at 261, *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

As the language of the conference report made clear, Congress's intent in enacting Section 9658 was

to "address[] the problem identified in the 301(e) study" by implementing the Study Group Report's recommendation to adopt a uniform federal discovery rule, in order to establish consistency in the availability of state-law tort remedies for latent contamination. Thus, by adopting Section 9658, Congress responded directly to the concern of the Study Group that victims of latent environmental harms be able to pursue tort claims. And among the Study Group's conclusions was that "the Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes – Analysis and Improvement of Legal Remedies pt. 1, at 256 (Comm. Print 1982). It could not be more clear that Section 9658 preempts state repose periods for tort claims based on toxic contamination.

B. Under Petitioner's theory, alleged tortfeasors can ensure that victims of latent harms are denied their day in court, especially harming the most vulnerable

Under Petitioner's theory, alleged tortfeasors can ensure that victims of latent harms are denied their day in court, contrary to Congress's clear intent, in at least two ways. First, allowing tortfeasors to use periods of repose to dodge suits by victims of toxic contamination will increase the perverse incentive to conceal contamination. Second, as government funding and resources become less available, even basic

efforts to investigate and remediate toxic sites will be fewer and further between – even aside from direct remedies for tort harms – and affected parties will lose the tools to address contamination's impacts effectively. The result will be that many of those who are most vulnerable to toxic contamination and least able to bear the costs of cleanup will be unable to recover for their harms.

The interpretation of Section 9658 proffered by Petitioner here would increase the perverse incentive to conceal contamination. Potentially responsible parties under CERCLA, and potential toxic tort defendants, already possess incentives to conceal their contamination, including the cost of legal disposal and the desire to avoid liability. Treating repose periods differently would allow defendants to avoid forever the liability for associated torts if they can delay injured parties' discovery of the contamination for the statutory period. Thus, in cases with a probability of tort claims in addition to CERCLA liability, potential defendants will be motivated to bury evidence. This prospect is especially troubling since these may be among the worst toxic contamination cases, and the evidence for the harms necessary to allege and prove a tort will go significantly beyond that necessary to prove a CERCLA cost recovery claim under strict liability principles.

Moreover, while state tort law is generally aimed at a different set of harms than CERCLA – injury to people and property, rather than recovery of costs of investigation and remediation – it is also likely that in the future, government agencies will possess even fewer resources and be capable of paying less atten-

tion to the problem of toxic contamination. Although CERCLA site remediation was initially funded through a trust fund financed primarily through taxes, the authority for the sustaining taxes expired in 1995. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380 SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST 3 (2010).[19] EPA now has limited funding to address future cleanup operations. *Id.* at 33. State budgets for hazardous waste cleanup are also constrained. *Id.* However, future remediation projects are expected to be more expensive and more difficult. *Id.*; *see also* National Research Council, *Alternatives for Managing the Nation's Complex Contaminated Groundwater Sites* 1 (2013) ("While there have been success stories over the past 30 years, the majority of hazardous waste sites that have been closed were relatively simple compared to the remaining caseload."). At the same time, many affected parties – in particular, low-income communities disproportionately located near sites of hazardous waste contamination – will lack the capability to fund investigation and remediation efforts privately. Thus, in addition to its role in ensuring remedies for harms that are not at all reached by CERCLA, tort liability may play a role in future efforts to clean up sites that might once have been remediated through government funding.

Reading Section 9658 not to apply to periods of repose would limit the availability of tort recovery for plaintiffs who have experienced latent personal inju-

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[19] *Available at* http://www.gao.gov/assets/310/304124.pdf.

ry or property damage – exactly the result Congress intended to avoid by enacting Section 9658. Those most likely to be affected by this result include military personnel and their families (who have lived and worked on the thousands of military sites discussed above that have not yet been remediated), young children (who, as discussed above, are most vulnerable to environmental toxicity, and would be unable to avail themselves of the special protections provided under 42 U.S.C. § 9658(b)(4)(B)(i)), and minorities and low-income communities (who, as discussed above, are most likely to live near toxic contamination, and are least able to afford advance cleanup costs recoverable through contribution). This is not the result that Congress intended in enacting Section 9658, and – for the reasons addressed above – does not reflect a proper interpretation of Section 9658.

C. State limitations periods that do not implement a discovery rule, however styled, impose precisely the same insurmountable burdens on plaintiffs bringing tort claims based on toxic contamination with latent harms

As explained above, diseases such as cancer typically do not manifest until well more than a decade after exposure to a chemical agent. Moreover, it is typical for property damage from chemical contamination to lie undiscovered under the ground for many years, even where a property owner is acting with reasonable diligence. In light of the typical, reasonable, and well-known latency of both personal injury

and property harm from contamination, state limitations periods based on the time of the plaintiff's injury or exposure, or the time of a defendant's acts or omissions – whether styled as "statutes of limitations," "statutes of repose," or some other phrase entirely – all impose the same burdens, in practice, on plaintiffs who allege harm from toxic contamination.

Periods of repose typically last between 2 to 12 years after the end of the conduct which raises liability. *Developments in the Law*, *supra* at 1609 n.42. Of the four state statutes identified by respondents as establishing repose periods that are generally applicable to personal injury and property damage cases, Resp. Br. 41 – and thus at issue here – three of the statutes set limitations of 10 years,[20] and one sets a limitation of only 3 years.[21] These periods are considerably shorter than the latency period of diseases caused by exposure to toxic contamination. *Developments in the Law*, *supra* at 1609 n.42. It is also shorter than the typical period of time for contamination to reach a plaintiff's land, or for a plaintiff to discover contamination on her land. For these reasons, reading Section 9658 to apply only to "statutes of limitation" as Petitioner defines the term means that many who suffer latent injuries as a result of hazardous waste contamination will be barred from bringing suit before they could be aware of any harm. This interpretation thus directly contravenes the purpose for which Congress enacted Section 9658.

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[20] *See* Or. Rev. Stat. Ann. § 12.115(1); Kan. Stat. Ann. § 60-513(b); N.C. Gen. Stat. § 1-52(16).

[21] *See* Conn. Gen. Stat. Ann. § 52-584.

For a victim of toxic contamination whose injury becomes apparent only after the time limit set by a period of repose has expired, it will be irrelevant that Section 9658 preempts any shorter limitations period set by common law or statute if it does not also preempt the repose period. For this reason, commentators have recognized that a construction of Section 9658 that would not preempt periods of repose would flout Congress's clear will. "Broadly construed, section 309[22] must apply to statutes of repose as well as statutes of limitations. It simply defeats congressional intent to hold otherwise; statutes of repose were specifically identified as part of the problem by the Study Group and adopted by Congress." Van R. Delhotal, *Re-Examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 WASHBURN L.J. 415, 457 (1995). Courts have similarly recognized this feature of the law. "The problem of plaintiffs losing their cause of action before they know they have it could not have been addressed unless statutes of repose were addressed." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008) (holding that Section 9658 preempted Oregon's statute of repose).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[22] 42 U.S.C. § 9658 (Section 9658) appears in CERCLA as Section 309.

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